



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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March 24, 2006

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** Robert J. Costa  
Acting Staff Director *RJC*

**FROM:** Lawrence H. Norton  
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**SUBJECT:** Final Rules and Explanation and Justification for the Internet  
Communications Rulemaking

**AGENDA ITEM**

For Meeting of: 3-23-06

(CONTINUED ON MARCH 27, 2006)

**SUBMITTED LATE**

Attached are the draft Final Rules and Explanation and Justification addressing Internet communications in order to comply with the District Court's decision in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied*, No. 04-5352 (Oct. 21, 2005).

Attachment

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**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 100, 110 and 114**

**[Notice 2006 - XX]**

**Internet Communications**

**AGENCY:** Federal Election Commission.

**ACTION:** Final Rules and Transmittal to Congress.

**SUMMARY:** The Federal Election Commission is amending its rules to include paid advertisements on the Internet in the definition of “public communication.” These final rules implement the recent decision of the U.S. District Court for the District of Columbia in Shays v. Federal Election Commission, which held that the previous definition of “public communication” impermissibly excluded all Internet communications. The revised definition of “public communication” includes paid Internet advertising placed on another person’s website, but does not encompass any other form of Internet communication. The Commission is also re-promulgating without change its definition of “generic campaign activity” and amending the scope of its disclaimer regulations, both of which incorporate the revised definition of “public communication.” Additionally, the Commission is adding new exceptions to the definitions of “contribution” and “expenditure” to

1 exclude Internet activities and communications that qualify as  
2 individual activity or that qualify for the “media exemption.”  
3 These final rules are intended to ensure that political committees  
4 properly finance and disclose their Internet communications,  
5 without impeding individual citizens from using the Internet to  
6 speak freely regarding candidates and elections. Further  
7 information is provided in the Supplementary Information that  
8 follows.

9 **EFFECTIVE DATE:** The effective date for the revisions to 11 CFR parts 100, 110, and  
10 114 is [INSERT DATE 30 DAYS AFTER THE DATE OF  
11 PUBLICATION IN THE FEDERAL REGISTER].

12 **FOR FURTHER**  
13 **INFORMATION**

14 **CONTACT:** Mr. Brad C. Deutsch, Assistant General Counsel, Mr. Richard T.  
15 Ewell, Ms. Amy L. Rothstein, or Ms. Esa L. Sferra, Attorneys, 999  
16 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800)  
17 424-9530.

18 **SUPPLEMENTARY**  
19 **INFORMATION:**

20 **Introduction**

21 The Commission is promulgating these final rules to provide guidance with  
22 respect to the use of the Internet in connection with Federal elections. The Commission  
23 commenced this rulemaking following a decision of the United States District Court for  
24 the District of Columbia in Shays v. Federal Election Commission, 337 F. Supp. 2d 28  
25 (D.D.C. 2004) (“Shays District”), aff’d, 414 F.3d 76 (D.C. Cir. 2005) (“Shays Appeal”),

1 reh’g en banc denied (Oct. 21, 2005), which required the Commission to remove the  
2 former wholesale exclusion of Internet activity from its definitions of two terms: “public  
3 communication” and “generic campaign activity.” In examining issues relating to  
4 Internet communications, the Commission has also decided to address several of its other  
5 rules to remove potential restrictions on the ability of individuals and others to use the  
6 Internet as a low-cost means of civic engagement and political advocacy.

7         These final rules follow the publication of a Notice of Proposed Rulemaking  
8 (“NPRM”) on Internet Communications, in which the Commission sought comments on  
9 several proposed revisions to its rules. See 70 FR 16967 (April 4, 2005). The  
10 Commission received more than 800 comments in response to the NPRM, the vast  
11 majority of which urged limited, if any, regulation of Internet activities. Additionally, the  
12 Commission received a letter from the Internal Revenue Service indicating, “the  
13 proposed rules do not pose a conflict with the Internal Revenue Code or the regulations  
14 thereunder.”

15         After reviewing the written comments and testimony provided at a hearing on  
16 June 28 and 29, 2005,<sup>1</sup> the Commission has decided to take the following six actions: (1)  
17 revise its definition of “public communication;” (2) re-promulgate the definition of  
18 “generic campaign activity” without revision; (3) revise the disclaimer requirements; (4)  
19 add an exception for uncompensated individual Internet activities; (5) revise the “media  
20 exemption;” and (6) add a new provision regarding the use of corporate and labor  
21 organization computers and other equipment for Internet activities by certain individuals.

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<sup>1</sup> The comments and a transcript of the hearing are available at  
<[http://www.fec.gov/law/law\\_rulemakings.shtml#Internet05](http://www.fec.gov/law/law_rulemakings.shtml#Internet05)>.

1           The Commission is aware of the heightened importance and public awareness of  
2 any change to its rules that could affect political activity and speech on the Internet. The  
3 Commission notes that the change to the definition of “public communication” in this  
4 rulemaking is a change to a definition that has a narrow impact on the law.<sup>2</sup> This term  
5 defines the scope of covered activity for a limited number of groups who are either  
6 already subject to Commission regulation, or who are coordinating with candidates or  
7 political parties who are themselves currently subject to regulation. FECA does not use  
8 the term “public communication” to regulate the vast majority of the American public’s  
9 activity on the Internet or elsewhere. Everyday activity by individuals, even when  
10 political in nature, will not be affected by the changes made in this rulemaking.

11           Through this rulemaking, the Commission recognizes the Internet as a unique and  
12 evolving mode of mass communication and political speech that is distinct from other  
13 media in a manner that warrants a restrained regulatory approach. The Internet’s  
14 accessibility, low cost, and interactive features make it a popular choice for sending and  
15 receiving information. Unlike other forms of mass communication, the Internet has  
16 minimal barriers to entry, including its low cost and widespread accessibility. Whereas  
17 the general public can communicate through television or radio broadcasts and most other  
18 forms of mass communication only by paying substantial advertising fees, the vast  
19 majority of the general public who choose to communicate through the Internet can  
20 afford to do so.

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<sup>2</sup> The change only impacts the following regulatory provisions: political party committees and State and local candidates are subject to restrictions on funding of Federal Election Activity (2 U.S.C. 431(20)); some political committees are required to allocate the costs of certain communications under 11 CFR 106.6(b); certain communications must be treated as contributions if coordinated with a Federal candidate or political party committee under 11 CFR 109.21 and 109.37; and certain communications must include disclaimer statements pursuant to 11 CFR 110.11.

1           When paid advertising on another person’s website does occur on the Internet, the  
2 expense of that advertising sets it apart from other uses of the Internet, although even the  
3 cost of advertising on another entity’s website will often be below the cost of advertising  
4 in some other media.

5           These final rules therefore implement the regulatory requirements mandated by  
6 the Shays District decision by focusing exclusively on Internet advertising that is placed  
7 for a fee on another person’s website. In addition, these rules add new exceptions to the  
8 definitions of “contribution” and “expenditure” to protect individual and media activity  
9 on the Internet.<sup>3</sup>

10           As a whole, these final rules make plain that the vast majority of Internet  
11 communications are, and will remain, free from campaign finance regulation. To the  
12 greatest extent permitted by Congress and the Shays District decision, the Commission is  
13 clarifying and affirming that Internet activities by individuals and groups of individuals  
14 face almost no regulatory burdens under the Federal Election Campaign Act. The need to  
15 safeguard Constitutionally-protected political speech allows no other approach.

#### 16 **Transmission of Final Rules to Congress**

17           Under the Administrative Procedure Act (“APA”), 5 U.S.C. 553(d), and the  
18 Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must  
19 submit final rules to the Speaker of the House of Representatives and the President of the  
20 Senate and publish them in the Federal Register at least 30 calendar days before they take  
21 effect. The final rules that follow were transmitted to Congress on [Insert date], 2006.

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<sup>3</sup> The terms “contribution” and “expenditure” include gifts, subscriptions, purchases, payments, distributions, loans, advances or deposits of money, or anything of value made by any person for the purpose of influencing any election for Federal office. See 2 U.S.C. 431(8)(A)(i) and 431(9)(A); see also 11 CFR Part 100, Subparts B & D.

1 **EXPLANATION AND JUSTIFICATION**

2 **I. Unique Characteristics and Uses of the Internet**

3 The Internet has a number of unique characteristics that distinguish it from  
4 traditional forms of mass communication.<sup>4</sup> Unlike television, radio, newspapers,  
5 magazines, or even billboards, “the Internet can hardly be considered a ‘scarce’  
6 expressive commodity. It provides relatively unlimited, low-cost capacity for  
7 communication of all kinds.” Reno v. ACLU, 521 U.S. 844, 870 (1997). In response to  
8 the NPRM, one commenter noted that a “computer and an Internet connection can turn  
9 anyone into a publisher who can speak to a mass audience.” For example, an individual  
10 with access to a computer and the Internet can create a free blog<sup>5</sup> at sites such as  
11 [www.blogger.com](http://www.blogger.com), [www.blogeasy.com](http://www.blogeasy.com), [spaces.msn.com](http://spaces.msn.com), or [www.typepad.com](http://www.typepad.com).  
12 Additionally, because an Internet communication is not limited in duration and is not  
13 subject to the same time and space limitations as television and radio programming, the  
14 Internet provides a means to communicate with a large and geographically widespread  
15 audience, often at very little cost.<sup>6</sup> Now that many public spaces such as libraries,  
16 schools, and coffee shops provide Internet access without charge, individuals can create

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<sup>4</sup> See Enrique Armijo, Public Airwaves, Private Mergers: Analyzing the FCC’s Faulty Justification for the 2003 Media Ownership Rule Change, N.C. L. REV. 1482, 1494 (May 2004) (discussing broadcast media and the Internet as “imperfect substitutes”); see also Ryan Z. Watts, Independent Expenditures on the Internet: Federal Election Law and Political Speech on the World Wide Web, 8 COMMLAW CONSPECTUS 149, 160 (Winter 2000) (discussing Reno v. ACLU, 521 U.S. 844 (1997) and the Internet’s differences from traditional media).

<sup>5</sup> The word “blog” derives from the term “Web log” and is defined as “an online diary; a personal chronological log of thoughts published on a Web page.” Webster’s New Millennium™ Dictionary of English, available at <<http://www.dictionary.com>> (last visited 3/24/06). People who maintain blogs are known as “bloggers.”

<sup>6</sup> See Edward L. Carter, Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 316-17 (January 2005) (“Internet is unlike traditional print or broadcast media in that messages can have a long shelf life--an Internet message can circulate via e-mail or remain posted somewhere even long after the message’s creator has tried to retract it.”).

1 their own political commentary and actively engage in political debate, rather than just  
2 read the views of others. In the words of one commenter, the Internet’s “near infinite  
3 capacity, diversity, and low cost of publication and access” has “democratized the mass  
4 distribution of information, especially in the political context.” The result is the most  
5 accessible marketplace of ideas in history.

6 It is common for businesses, groups, and even individuals, to make their own  
7 media – their website space – available to readers without charge. Whereas a newspaper  
8 can afford to devote only a limited amount of its print to others without charge in the  
9 form of letters to the editor, and a television station can afford to provide only a very  
10 limited amount of air time to viewers for similar purposes, some bloggers can and often  
11 do publish every message submitted by readers. In fact, one commenter drew upon his  
12 own experience as a blogger in noting that much of the emerging Internet culture depends  
13 on collaboration for the construction of a blog or website, the generation of content  
14 (according to the blogger’s testimony, most blogs do not have paid staff to perform such  
15 functions), and the sharing of information and online resources. The commenter stated  
16 that his website has more than 50,000 registered users contributing to its content, and he  
17 estimated that he writes only about 2,000 of the 200,000 words of content published on  
18 his website each day.

19 A number of commenters also noted that the Internet differs from traditional  
20 forms of mass communication because individuals must generally be proactive in order to  
21 access information on a website, whereas individuals receive information from television  
22 or radio the instant the device is turned on, or passively view a billboard while driving or  
23 walking down a street. These comments echo the Supreme Court’s observation that

1 communications over the Internet are not as “invasive” as communications made through  
2 traditional media. See Reno, 521 U.S. at 869. For example, a television viewer who  
3 tunes in to watch a particular show presumably seeks the content provided in that show,  
4 but is also subjected to “invasive” commercial advertising messages that he or she did not  
5 seek. The advertiser pays a premium to bring its message to an audience precisely  
6 because the audience would not have chosen to seek out the message otherwise. In  
7 contrast, a website’s information is seen only by those who choose to visit and view it.

8         During 2005, an estimated 204 million people in the United States used the  
9 Internet.<sup>7</sup> In the first half of 2005, an estimated 67 percent of the adult American  
10 population used the Internet.<sup>8</sup> At the end of 2004, 87 percent of American teens (ages 12-  
11 17, representing the next generation of voters) were using the Internet.<sup>9</sup> On average, 70  
12 million American adults logged onto the Internet on a daily basis.<sup>10</sup>

13         A growing segment of the American population uses the Internet as a supplement  
14 to, or as a replacement for, more traditional sources of information and entertainment,  
15 such as newspapers, magazines, television, and radio. By mid-2004, 92 million  
16 Americans reported obtaining news from the Internet.<sup>11</sup>

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<sup>7</sup> See Internet World Stats available at <<http://www.Internetworldstats.com/stats2.htm>> (last visited 3/24/06).

<sup>8</sup> See Pew Internet & American Life Project, How Women and Men use the Internet, p. I, (2005) available at <[http://www.pewInternet.org/pdfs/PIP\\_Women\\_and\\_Men\\_online.pdf](http://www.pewInternet.org/pdfs/PIP_Women_and_Men_online.pdf)> (last visited 3/24/06).

<sup>9</sup> See Pew Internet & American Life Project, Teens and Technology, p. I (2005) available at <[http://www.pewInternet.org/pdfs/PIP\\_Teens\\_Tech\\_July2005web.pdf](http://www.pewInternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf)> (last visited 3/24/06).

<sup>10</sup> See Pew Internet & American Life Project, Trends 2005, Chapter 4, Internet: The Mainstreaming of Online Life, p. 58 (2005) available at <[http://www.pewInternet.org/pdfs/Internet\\_Status\\_2005.pdf](http://www.pewInternet.org/pdfs/Internet_Status_2005.pdf)> (last visited 3/24/06).

<sup>11</sup> See Pew Internet & American Life Project and the University of Michigan School of Information, The Internet and the Democratic Debate, p. 2 (October 27, 2004) available at <[http://www.pewInternet.org/pdfs/PIP\\_Political\\_Info\\_Report.pdf](http://www.pewInternet.org/pdfs/PIP_Political_Info_Report.pdf)> (last visited 3/24/06).

1           The 2004 election cycle also marked a dramatic shift in the scope and manner in  
2 which Americans used websites, blogs, listservs,<sup>12</sup> and other Internet communications to  
3 obtain information on a wide range of campaign issues and candidates.<sup>13</sup> The number of  
4 Americans using the Internet as a source of campaign news more than doubled between  
5 2000 and 2004, from 30 million to 63 million.<sup>14</sup> An estimated 11 million people relied on  
6 politically oriented blogs as a primary source of information during the 2004 presidential  
7 campaign,<sup>15</sup> and 18 percent of all Americans cited the Internet as their leading source of  
8 news about the 2004 presidential election.<sup>16</sup>

9           Individuals not only sought information about campaigns on the Internet, but also  
10 took advantage of the low cost of Internet communication as they took active roles in  
11 supporting policies and candidates. According to a number of commenters, common  
12 Internet activities have included: posting commentary regarding Federal candidates and  
13 political parties on their own websites; submitting comments regarding Federal  
14 candidates and political parties on websites owned by other individuals; creating  
15 advertisements, videos, and other audiovisual tools for distribution on the Internet;  
16 fundraising; promoting or republishing candidate-authored materials; participating in  
17 online “chats” about campaigns; providing hyperlinks from their own websites to

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<sup>12</sup> A “listserv” is a software program that automatically sends electronic mail messages to multiple e-mail addresses on an electronic mail list. See, e.g., <<http://www.lsoft.com/products/listserv.asp>> (last visited 3/24/06). The term “listserv” is commonly used, however, to denote the electronic mail list itself or the automated forwarding to all addresses on the mailing list of an e-mail sent only to the listserv’s e-mail address.

<sup>13</sup> See Pew Internet & American Life Project, The Internet and Campaign 2004, available at <[http://www.pewInternet.org/pdfs/PIP\\_2004\\_Campaign.pdf](http://www.pewInternet.org/pdfs/PIP_2004_Campaign.pdf)> (last visited 3/24/06).

<sup>14</sup> See note 9, above, The Internet and Democratic Debate, p. 2. During the same time period, the number of people reporting television as their primary source of campaign information declined. Id.

<sup>15</sup> See Jessica Mintz, When Bloggers Make News - - As Their Count Increases, Web Diarists Are Asking: Just What Are the Rules? WALL ST. J., Jan. 21, 2005 at B1.

<sup>16</sup> See note 10, above, The Mainstreaming of Online Life, p. 2.

1 campaign websites and other websites; and using e-mail to organize grassroots political  
2 activities.

3           A number of commenters suggested that the potential for a free exchange of  
4 information and opinions through the Internet promotes access to information about  
5 candidates, ballot measures, and legislation. More than half of the hundreds of  
6 commenters expressed concern that the same unique characteristics of the Internet that  
7 make it so widely accessible to individuals and small groups also makes it more likely  
8 that individuals and small groups whose web activities generally are not regulated by  
9 FECA might engage in activities that unintentionally trigger Federal regulation. Whereas  
10 the corporations and other organizations capable of paying for advertising in traditional  
11 forms of mass communication are also likely to possess the financial resources to obtain  
12 legal counsel and monitor Commission regulations, individuals and small groups  
13 generally do not have such resources. Nor do they have the resources, as one commenter  
14 cautioned, to respond to politically motivated complaints in the enforcement context.  
15 Several commenters warned that individuals might simply cease their Internet activities  
16 rather than attempt to comply with regulations they found overly burdensome and costly.  
17 Thus, some commenters asserted, it is essential that the Commission narrow the scope  
18 and impact of any regulation of Internet activity and establish bright-line regulations to  
19 delineate any restricted activity in order to avoid chilling political participation and  
20 speech on the Internet.

## 21 **II. Congressional Action, Commission Action, and the Courts**

22           The Bipartisan Campaign Reform Act of 2002, Public Law No. 107–155, 116  
23 Stat. 81 (2002) (“BCRA”), amended the Federal Election Campaign Act of 1971, as

1 amended (the “Act”), 2 U.S.C. 431 et seq., in various respects. The Commission  
2 implemented these changes in the law through a series of rulemakings during 2002.

3 First, Congress required State, district, and local political party committees and  
4 organizations, as well as State and local candidates, to use only Federal funds<sup>17</sup> to pay for  
5 any “public communication” that promotes, supports, attacks or opposes (“PASOs”) a  
6 clearly identified candidate for Federal office. See 2 U.S.C. 431(20)(A)(iii) and 441i(b)  
7 and (f); see also 11 CFR 100.24(b)(3) and (c)(1), 300.32(a)(1) and (2), and 300.71.<sup>18</sup>  
8 Congress defined a “public communication” as “a communication by means of any  
9 broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising  
10 facility, mass mailing, or telephone bank to the general public, or any other form of  
11 general public political advertising.” 2 U.S.C. 431(22). When the Commission  
12 promulgated regulations to implement these BCRA provisions, it explicitly excluded all  
13 Internet communications from its definition of “public communication” and, therefore,  
14 none of the Commission’s rules governing the funding of “public communications”  
15 applied to Internet communications. See 11 CFR 100.26; Final Rules on Prohibited and  
16 Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR 49064 (July 29,  
17 2002) (“Soft Money Final Rules”).

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<sup>17</sup> “Federal funds” are funds subject to the limitations, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g). “Non-Federal funds” are funds not subject to the limitations and prohibitions of the Act. See 11 CFR 300.2(k).

<sup>18</sup> There are four types of “Federal election activity”: Type 1 - Voter registration activity during the period that begins on the date that is 120 days before a regularly scheduled Federal election is held and ends on the date of the election; Type 2 - Voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot; Type 3 - A public communication that promotes, supports, attacks or opposes a clearly identified candidate for Federal office; and Type 4 - Services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual’s compensated time during that month on activities in connection with a Federal election. See 2 U.S.C. 431(20) and 11 CFR 100.24.

1           Second, Congress restricted the funds that State, district, and local political party  
2 committees may use for certain types of “Federal election activity” (“FEA”), including  
3 “generic campaign activity.” 2 U.S.C. 431(20)(A)(ii) and 441i(b); 11 CFR 100.24(2)(ii)  
4 and 300.33(a)(2).<sup>19</sup> Congress defined “generic campaign activity” as “campaign activity  
5 that promotes a political party and does not promote a [Federal] candidate or non-Federal  
6 candidate.” 2 U.S.C. 431(21). The Commission incorporated the term “public  
7 communication,” along with its exclusion of Internet communications, into the definition  
8 of “generic campaign activity” in its rules. See 11 CFR 100.25; Soft Money Final Rules;  
9 Final Rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003)  
10 (“Coordinated Communication Final Rules”).

11           Third, Congress expressly repealed the Commission’s then-existing rules on  
12 “coordinated general public political communication” at former 11 CFR 100.23 and  
13 instructed the Commission to promulgate new regulations on “coordinated  
14 communications paid for by persons other than candidates, authorized committees of  
15 candidates, and party committees.” See Public Law No. 107–155, sections 214(b) and (c)  
16 (March 27, 2002). When the Commission subsequently promulgated regulations  
17 implementing this provision, it required that a communication be a “public

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<sup>19</sup> State, district, and local party committees and organizations may use an allocated mix of Federal funds and “Levin funds” to pay for “generic campaign activity” conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot), or the party committee or organization must pay for the communication entirely with Federal funds. See 2 U.S.C. 441i(b)(2)(A); 11 CFR 300.32(b)(1)(ii), 300.32(c) and 300.33. “Levin funds” are a type of non-Federal funds created by BCRA that may be raised and spent by State, district, and local party committees and organizations to pay for the allocable portion of Types 1 and 2 Federal election activity. See 2 U.S.C. 441i(b)(2)(A) and (B); 11 CFR 300.2(i), 300.32(b). These funds may include donations from some sources ordinarily prohibited by Federal law (e.g., corporations, labor organizations and Federal contractors) to the extent permitted by State law, but are limited to \$10,000 per calendar year from any source or to the limits set by State law – whichever limit is lower. See 11 CFR 300.31.

1 communication” as defined in 11 CFR 100.26 to qualify as either a “coordinated  
2 communication” or a “party coordinated communication.” 11 CFR 109.21(c) and  
3 109.37(a)(2);<sup>20</sup> see also Coordinated Communication Final Rules at 428-431. Thus,  
4 Internet communications were excluded from the regulations pertaining to “coordinated  
5 communications” and “party coordinated communications.”<sup>21</sup>

6 Fourth, Congress revised the “disclaimer” requirements in 2 U.S.C. 441d by  
7 requiring a disclaimer whenever a disbursement for “general public political advertising”  
8 is either made by any political committee, or expressly advocates the election or defeat of  
9 a clearly identified candidate, or solicits any contribution. The Commission relied  
10 primarily on the definition of “public communication” in 11 CFR 100.26 when it  
11 implemented the new disclaimer requirements, although it also required disclaimers for  
12 political committee websites available to the general public and certain unsolicited  
13 electronic mailings of more than 500 substantially similar communications. See 11 CFR  
14 110.11(a); Final Rules on Disclaimers, Fraudulent Solicitation, Civil Penalties, and  
15 Personal Use of Campaign Funds, 67 FR 76962 (Dec. 13, 2002) (“Disclaimer Final  
16 Rules”). As a result, most Internet content was excluded from the disclaimer  
17 requirements. See id.

18 The Commission also incorporated the term “public communication” into two  
19 other regulations at 11 CFR 300.2(b)(4) and 11 CFR 106.6, and thereby excluded Internet  
20 content from those requirements as well. The first of these regulations defines an “agent”

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<sup>20</sup> An “electioneering communication” may also be a coordinated communication. See 11 CFR 109.21(c)(1). However, because electioneering communications are limited to broadcast, cable, or satellite communications, they constitute a subset of public communications. See 2 U.S.C. 434(f)(3); 11 CFR 100.29 (defining an electioneering communication as a “broadcast, cable, or satellite communication” that refers to a clearly identified candidate for Federal office, is publicly distributed within 60 days before a general election for the office sought by the candidate, or within 30 days before the primary election for that office, and is targeted to the relevant electorate).

1 of a candidate for State or local office as a person who has actual authority by that  
2 candidate to “spend funds for a public communication.” See 11 CFR 300.2(b)(4); Soft  
3 Money Final Rules. The second of these rules incorporates the term “public  
4 communication” into the allocation rules governing certain spending by a separate  
5 segregated fund (“SSF”) or a nonconnected committee. See Final Rules on Political  
6 Committee Status, Definition of Contribution, and Allocation for Separate Segregated  
7 Funds and Nonconnected Committees, 69 FR 68056 (Nov. 23, 2004) (“Political  
8 Committee Status Final Rules”). Whenever an SSF or nonconnected committee pays for  
9 a “public communication” that (1) refers to a political party, but does not refer to any  
10 clearly identified Federal or non-Federal candidate, or (2) refers to one or more clearly  
11 identified Federal or non-Federal candidates, the SSF or nonconnected committee must  
12 pay for the communication entirely with Federal funds or by allocating such expenses  
13 between its Federal and non-Federal accounts in accordance with 11 CFR 106.6(b) and  
14 (f). See id.

15 The Shays District decision invalidated the Commission’s definition of “public  
16 communication” at 11 CFR 100.26, Shays District at 64-65, based on the Commission’s  
17 complete exclusion of Internet communications from this definition. After noting that  
18 Congress used the phrase “or any other form of general public political advertising” as a  
19 catch-all in BCRA’s definition of “public communication,” the Shays District court  
20 concluded that “[w]hile all Internet communications do not fall within [the scope of ‘any  
21 other form of general public political advertising’], some clearly do.” Shays District at

1 67.<sup>22</sup> The Shays District court left it to the Commission to determine “what constitutes  
2 ‘general public political advertising’ in the world of the Internet,” and thus should be  
3 treated as a “public communication.” Id. at 70.

4 The Shays District court also found the Commission’s rule defining the term  
5 “generic campaign activity” to be similarly underinclusive because it incorporated the  
6 regulatory definition of “public communication,” which excluded all forms of Internet  
7 communications. Id. at 112. Although the Shays District court found that the 2002  
8 Notice of Proposed Rulemaking for “generic campaign activity” failed to satisfy the  
9 requirements of the APA because it did not provide adequate notice to the public that the  
10 Commission might define “generic campaign activity” as a “public communication” in  
11 the final rules, the Shays District court otherwise approved the definition of “generic  
12 campaign activity” as limited to “public communications.” Id. at 112, citing the Soft  
13 Money Final Rules at 35675.

14 The Shays District court remanded the rules defining “public communication,”  
15 “generic campaign activity,” and “coordinated communication” to the Commission for  
16 further action consistent with its opinion. Shays District at 131. The Commission  
17 subsequently issued the NPRM addressing the definition of “public communication” in

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<sup>22</sup> The District Court analyzed the Commission’s rules under a two-step test set out by the Supreme Court in Chevron, U.S.A., Inc. v. National Res. Def. Council, 467 U.S. 837 (1984) (“Chevron”). The first step of the Chevron analysis examines whether Congress has directly spoken to the precise questions at issue. The second step considers whether the agency’s resolution of an issue not addressed in the statute is based on a permissible construction of the statute. In reviewing the definition of “public communication,” the District Court found that the rule’s exclusion of all Internet communications did not comport with the plain meaning of the statutory requirement that all forms of general public political advertising be considered forms of “public communication,” and therefore did not satisfy step one of the Chevron test. Shays District at 69-70. The Commission did not appeal the portion of the Shays District decision regarding the definition of a “public communication.” The Shays District decision also stated that, in the alternative, the regulatory definition of “public communication” as applied to the “content prong” of the coordinated communication regulations in 11 CFR 109.21(c) was impermissibly narrowed by the coordination regulation, thereby undermining the purposes of the Act and thus providing an independent basis for invalidation under step two of the Chevron test. See Shays District at 70-71.

1 each of the remanded regulations. In the NPRM, the Commission also noted that the  
2 term “public communication” is incorporated into two other sections of its regulations, 11  
3 CFR 106.6(b) and (f) (allocation of expenses between Federal and non-Federal activities  
4 by SSFs and nonconnected committees), and 11 CFR 300.2(b)(4) (definition of “agent”  
5 for non-Federal candidates). The Commission also proposed new exceptions from the  
6 definitions of “contribution” and “expenditure” to exempt volunteer and independent  
7 activity on the Internet, and proposed an additional clarification that certain Internet  
8 activities would qualify for the media exemption. In addition, the Commission proposed  
9 revisions to its rules in 11 CFR 114.9 regarding employee use of corporate and labor  
10 organization computers, software, and other Internet equipment and services for  
11 individual Internet activities.

### 12 13 **III. 11 CFR 100.26 – Definition of “Public Communication”**

#### 14 A. Proposed 11 CFR 100.26 Published in the NPRM

15 The Shays District decision required the Commission to identify those Internet  
16 communications that qualify as “general public political advertising,” and thus would be  
17 encompassed within the definition of “public communication” in 2 U.S.C. 431(22).  
18 While drafting a proposed rule, the Commission recognized the important purpose of  
19 BCRA in preventing actual and apparent corruption and the circumvention of the Act as  
20 well as the plain meaning of “general public political advertising,” and the significant  
21 public policy considerations that encourage the promotion of the Internet as a unique  
22 forum for free or low-cost speech and open information exchange. The Commission was  
23 also mindful that there is no record that Internet activities present any significant danger

1 of corruption or the appearance of corruption, nor has the Commission seen evidence that  
2 its 2002 definition of “public communication” has led to circumvention of the law or  
3 fostered corruption or the appearance thereof. Therefore, the Commission proposed to  
4 treat paid Internet advertising on another person’s website as a “public communication,”  
5 but otherwise sought to exclude all Internet communications from the definition of  
6 “public communication.”<sup>23</sup>

7 B. Comments on the Proposed Rule

8 Most commenters who addressed the Shays District court’s requirement that the  
9 Commission include some forms of Internet communications as “general public political  
10 advertising” expressed general support for the rule as proposed in the NPRM.<sup>24</sup> These  
11 commenters praised the Commission’s proposed separate treatment of communications  
12 on a person’s own website as distinct from communications placed on another person’s  
13 website, and nearly all commenters agreed that paid advertisements placed on another  
14 person’s website are “general public political advertising.” One commenter noted that  
15 Congress had defined “public communication” in 2 U.S.C. 431(22) by listing several  
16 examples of media such as television, radio, billboards and newspapers. That commenter  
17 observed that communications through the listed forms of media are typically placed for  
18 a fee. The commenter concluded that it would be appropriate from a statutory  
19 perspective for the Commission to capture within the definition of “public

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<sup>23</sup> The term “person” is defined to include “an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.” 2 U.S.C. 431(11).

<sup>24</sup> Several commenters argued that the Commission should preserve the status quo and continue to exclude all Internet communications from the definition of “public communication.” The Commission does not believe that such an approach would comport with the Shays District decision.

1 communication” only those Internet communications placed for a fee on another person’s  
2 website.

3 Another commenter generally supported the proposed rule, but recommended  
4 that the definition also encompass advertisements provided in exchange for something of  
5 value other than money (e.g., an advertising trade or link exchange). Two other  
6 commenters, however, cautioned against including any Internet communications that do  
7 not involve the exchange of money. In light of the unique nature and variety of Internet  
8 communications, these commenters explained, the value of these communications would  
9 be difficult to ascertain under the Commission’s traditional tests for normal and usual  
10 charge or fair market value.<sup>25</sup>

11 A few commenters expressed concern that the proposed rule would allow  
12 corporations and labor organizations to make unregulated in-kind contributions to Federal  
13 candidates through coordinated communications on the Internet, although such  
14 coordinated communications would be regulated or prohibited if done through other  
15 media. One group of commenters listed activities of this nature that they believed would  
16 be permitted under the proposed definition of “public communication” in 11 CFR 100.26,  
17 including: (1) an individual, political committee, or corporation pays to place banner  
18 advertisements<sup>26</sup> on another person’s website for a fee; (2) a corporation or labor

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<sup>25</sup> The “usual and normal charge for goods” is defined as “the price of those goods in the market from which they ordinarily would have been purchased at the time of the [contribution or expenditure],” and the “usual and normal charge for services” is defined as “the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.” 11 CFR 100.57(d)(2) and 100.111(e)(2). See, e.g., Advisory Opinion 2006-01 (discounted rate provided by publisher to other large-quantity purchasers is the normal and usual charge that candidate’s committee is required to pay to purchase large quantity’s of the candidate’s book).

<sup>26</sup> “Banner advertisements” are advertisements on a Web page that convey messages in text, animated graphics, and sound. They traditionally appear in rectangular shape, but may take any shape. Typically, banner advertisements are linked to the advertiser’s website, which enables a viewer to “click through” the

1 organization pays for a pop-up ad that will appear over another person’s website;<sup>27</sup> (3) an  
2 individual pays to hire a video production company to produce a video that contains a  
3 message written by a candidate for Federal office, purchases an e-mail list, and sends the  
4 video to all the addresses on the purchased list; and (4) a State party committee pays to  
5 produce a video that refers solely to a candidate for Federal office and distributes the  
6 video only through its own website. Each of these activities is addressed below.

7 C. Revised Rule: Internet Communications Placed on Another Person’s Website for a  
8 Fee Are “General Public Political Advertising”

9 The Commission concludes that Internet communications placed on another  
10 person’s website for a fee are “general public political advertising,” and are thus “public  
11 communications” as defined in 11 CFR 100.26. Under this rule, when someone such as  
12 an individual, political committee, labor organization or corporation pays a fee to place a  
13 banner, video, or pop-up ad on another person’s website, the person paying makes a  
14 public communication. Accordingly, the final rule is largely the same as the proposed  
15 rule. While no other form of Internet communication is included in the definition of  
16 “public communication,” the placement of advertising on another person’s website for a  
17 fee includes all potential forms of advertising, such as banner advertisements, streaming

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advertisement to view the advertiser’s website for further information on the product or service advertised. See <<http://www.netlingo.com/lookup.cfm?term=ad+banner>> (last visited 3/24/06).

<sup>27</sup> “Pop-up” advertisements usually appear in a separate browser window from the one being viewed. The advertisements are superimposed over the window being viewed, and require the viewer to take some action, such as closing the window in which the pop-up advertisement appears, to continue viewing the underlying browser window. See <<http://www.netlingo.com/lookup.cfm?term=pop%20Dup%20ad>> (last visited 3/24/06).

1 video, pop-up advertisements,<sup>28</sup> and directed search results.<sup>29</sup> The rule thus resolves  
2 concerns about the first two activities described in the previous paragraph.

3         The revised definition of “public communication” comports with the Shays  
4 District decision by removing the wholesale exclusion of all Internet communications  
5 from the definition of “public communication.” At the same time, the rule is carefully  
6 tailored to avoid infringing on the free and low-cost uses of the Internet that enable  
7 individuals and groups to engage in political discussion and advocacy on equal footing  
8 with corporations, labor organizations, and political committees, without the need to raise  
9 large amounts of funds.

10         The forms of mass communication enumerated in the definition of “public  
11 communication” in 2 U.S.C. 431(22), including television, radio, and newspapers, each  
12 lends itself to distribution of content through an entity ordinarily owned or controlled by  
13 another person. Thus, for an individual to communicate with the public using any of the  
14 forms of media listed by Congress, he or she must ordinarily pay an intermediary  
15 (generally a facility owner) for access to the public through that form of media each time  
16 he or she wishes to make a communication. This is also true for mass mailings and  
17 telephone banks, which are other forms of “public communication” under 2 U.S.C.

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<sup>28</sup> Although a pop-up advertisement may not technically be part of the underlying website or account, the Commission determines that it is “placed on” a website such that it qualifies as a public communication when a fee is paid, or normally charged, for the pop-up.

<sup>29</sup> For example, companies such as Google and Yahoo! permit an advertiser to pay a fee to have its website appear as a “sponsored link,” or otherwise featured, when specific words are typed into the website’s search engine. See <<http://www.google.com/intl/en/webmasters/1.html>> (last visited 3/24/06) and <<http://searchmarketing.yahoo.com/srch/index.php>> (last visited 3/24/06). If a fee is paid for such a service, then the resulting display of the product, hyperlink, or other message constitutes a form of “general public political advertising.” However, when the search results are displayed as a result of the normal function of a search engine, and not based on any payment for the display of a result, the search results are not forms of “general public political advertising.” In addition, where a search engine returns a website hyperlink in its normal course, and features the same hyperlink separately as the result of a paid sponsorship arrangement, the latter is a “public communication” while the former is not.

1 431(22). A communication to the general public on one's own website, by contrast, does  
2 not normally involve the payment of a fee to an intermediary for each communication.

3         The cost of placing a particular piece of political commentary on the Web is  
4 generally insignificant. The cost of such activity is often only the time and energy that is  
5 devoted by an individual to share his or her views and opinions with the rest of the  
6 Internet community. In this respect, a communication through one's own website is  
7 analogous to a communication made from a soapbox in a public square. There is no  
8 evidence in the legislative history of BCRA of a Congressional intent to regulate  
9 individual speech simply because it takes place through online media.

10         Communications placed for a fee on another person's website, however, are  
11 analogous to the forms of "public communication" enumerated by Congress in 2 U.S.C.  
12 431(23), particularly in light of the growing popularity of Internet advertising. As the  
13 public has turned increasingly to the Internet for information and entertainment,  
14 advertisers have embraced the Internet and its new marketing opportunities. Internet  
15 advertising revenue increased by 33.9 percent between the third quarter of 2004 and the  
16 third quarter of 2005 and reached \$3.1 billion for the third quarter of 2005.<sup>30</sup> The cost of  
17 advertising on the Internet distinguishes it from other forms of Internet communication,  
18 such as blogging or publishing one's own website, which are generally performed for free  
19 or at low cost.

20         Moreover, because Congress did not include the Internet in the list of media  
21 enumerated in the statutory definition of "public communication," an Internet

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<sup>30</sup> See Interactive Advertising Bureau, "Internet Advertising Revenues Surpass \$3 Billion for Q3; Run Rate for Full Year 2005 on Pace to Exceed \$12 Billion" (Nov. 21, 2005), available at [http://www.iab.net/news/pr\\_2005\\_11\\_21.asp](http://www.iab.net/news/pr_2005_11_21.asp) (last visited 3/24/06).

1 communication can qualify as a “public communication” only if it is a form of  
2 advertising and therefore falls within the catch-all category of “general public political  
3 advertising.” See 2 U.S.C. 431(22). By definition, the word “advertising” connotes a  
4 communication for which a payment is required, particularly in the context of campaign  
5 messages. See, e.g., The American Heritage® Dictionary of the English Language (4<sup>th</sup>  
6 ed. 2000) (“The activity of attracting public attention to a product or business, as by paid  
7 announcements in the print, broadcast or electronic media.”); The Random House  
8 Webster’s Unabridged Dictionary (2d ed. 2005) (“1. The act or practice of calling public  
9 attention to one’s product, service, need, etc., esp. by paid announcements in newspapers  
10 and magazines, over radio or television, on billboards, etc.; . . . 2. paid announcements;  
11 advertisements.”); J.I. Richards and C. M. Curran, Oracles on “Advertising”: Searching  
12 for a Definition, 31 JOURNAL OF ADVERTISING at 3 (June 2002) (An extensive survey of  
13 advertising and marketing textbooks revealed “certain recurring elements: (1) paid, (2)  
14 nonpersonal, (3) identified sponsor, (4) mass media, and (5) persuade or influence.”)

15         The Commission notes that this definition of “public communication”  
16 encompasses the types of advertising that some commenters were concerned should be  
17 covered, such as payments for advertising on a website on behalf of a candidate’s  
18 authorized committee or political party committee by a corporation or labor organization.  
19 As discussed below, this rule, in concert with the existing coordination regulations  
20 regulates in-kind payments of such advertisements by third parties.

21         On the Internet, where individuals can build blogs and other websites for free, an  
22 individual can communicate with the general public at little or no cost. However, this is  
23 not true in the case of paid advertising on another person’s website. For example, one of

1 the commenters operates a website and sells advertising space for between \$1,300 and  
2 \$5,000 per week.<sup>31</sup> Another commenter stated that the “minimum to run a banner ad  
3 campaign on most newspaper websites and portals is roughly \$5,000.” The Chicago  
4 Tribune, for example, charges \$5,000 per week for a “header ad” on  
5 <[www.chicagotribune.com](http://www.chicagotribune.com)>, and \$20,000 per week for a “homepage cube.” See  
6 <[www.tribuneinteractive.com/chicago/mediakit/rates.htm](http://www.tribuneinteractive.com/chicago/mediakit/rates.htm)> (last visited 3/24/06).  
7 Although paying for an advertisement on Chicagotribune.com may be less expensive than  
8 paying to place the same ad in the Chicago Tribune newspaper, both still require  
9 substantial funding. Furthermore, in both cases the advertiser is paying for access to an  
10 established audience using a forum controlled by another person, rather than using a  
11 forum that he or she controls to establish his or her own audience.

12 Three commenters requested a clarification regarding the proposed rule’s  
13 exclusion of all Internet “communications” with the exception of certain paid  
14 “announcements,” and asked whether the Commission intended to attach any significance  
15 to the use of “announcements” instead of “communications” in the exception. The  
16 Commission did not intend any distinction through the use of different terms. To avoid  
17 confusion, the Commission has substituted “communication” in place of “announcement”  
18 in the final rule.

19 One of the commenters suggested adding a content requirement to the  
20 Commission’s definition of “public communication” by substituting the term “express  
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<sup>31</sup> See <<http://www.dailykos.com/special/advertising>> (last visited 3/24/06).

1 advocacy”<sup>32</sup> for “announcement” and “communication.” The Commission is not limiting  
2 the definition of “public communication” by requiring any particular content, such as  
3 “express advocacy.” There is no content requirement in the statutory definition of  
4 “public communication,” and there is no other basis for providing an additional content  
5 standard in the definition itself, whether the communications are made through the  
6 Internet or another medium. See 2 U.S.C. 431(22). The content of the communication is  
7 addressed separately, such as the requirement that a State, district, or local party  
8 committee use only Federal funds to pay for public communications that PASO a Federal  
9 candidate. See, e.g., 2 U.S.C. 431(20); 11 CFR 100.24(b)(3) and (c)(1), 300.32(a)(1) and  
10 (2), and 300.71. Thus, limiting the definition of “public communication” to only those  
11 communications containing “express advocacy” would be inconsistent with the Act’s  
12 recognition in section 431(20) that some public communications contain PASO  
13 messages, but not express advocacy.

14 A different commenter suggested substituting “advertising” in place of  
15 “communication.” The Commission is not adopting this suggestion because it is circular  
16 and could inject ambiguity into the definition of “public communication.” The result of  
17 the commenter’s proposed change would be that “Internet advertising placed for a fee”  
18 would be a form of “general public political advertising.” That approach would appear to  
19 indicate that there are forms of advertising on the Internet other than paid advertising,  
20 which is contrary to the Commission’s view and to the basis of the revised definition of

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<sup>32</sup> The term “expressly advocating” is defined in 11 CFR 100.22 to include phrases such as “vote for the President, re-elect your Congressman,” and other slogans and words “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s),” or that, “when taken as a whole and with limited reference to external events such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates.”

1 “public communication,” which rests on the definition of “advertising” as a paid  
2 communication.

3 D. No Threshold Payment Amount for “General Public Political Advertising”

4 Several commenters argued that low-cost “pay-per-click” ads are too difficult to  
5 value because the cost of the ad is often variable, measured after the fact, and too low to  
6 warrant regulation as a “public communication.” For example, one commenter pointed to  
7 advertising opportunities available for \$10-\$25 per week through BlogAds.com.  
8 Commenters urged the Commission to revise the definition of “public communication” to  
9 capture only paid Internet ads that cost more than a certain threshold dollar amount. One  
10 of these commenters recommended that the Commission seek additional comment to  
11 determine the appropriate threshold amount and to index that resulting amount for  
12 inflation or re-examine the amount on a regular basis.

13 The Commission is not establishing a minimum threshold amount in the final  
14 rule. There is no stated threshold payment amount in the statutory definition of “public  
15 communication,” and it is not clear on what statutory basis the Commission could  
16 establish one. Nor was the Commission able to establish a record that would justify a  
17 particular threshold. Congress could have chosen, but did not, to establish a specific  
18 threshold cost below which an advertisement would not be a “public communication.”  
19 Thus, even late-night advertisements on small radio stations, low-cost classified ads in  
20 small circulation newspapers, and low-cost billboards in relatively remote areas are forms  
21 of “public communication” under 2 U.S.C. 431(13). Accordingly, all Internet  
22 communications placed for a fee on another person’s website qualify as “public  
23 communications.”

1           Nevertheless, as a matter of enforcement policy, the Commission may exercise  
2 prosecutorial discretion regarding “public communications” on the Internet that involve  
3 insubstantial advertising charges. The amount claimed to have been spent in violation of  
4 law is always a factor in the Commission’s enforcement decisions, and here, the  
5 Commission will be additionally mindful of the importance of minimizing any potential  
6 regulatory burden on the use of the Internet.

7 E. Advertiser, Not Website Operator, Makes the “Public Communication”

8           One commenter requested that the Commission clarify that the person who makes  
9 a “public communication” is the person seeking to place an Internet advertisement on  
10 another person’s website, not the person controlling the website on which the  
11 advertisement appears. The Commission agrees that this is the intended operation of the  
12 rule and notes that the regulations that incorporate the term “public communication”  
13 clearly regulate the person paying for the “public communication.” See 11 CFR  
14 100.24(b)(3) and (c)(1), 106.6, 109.21, 109.37, 110.11, 300.2, 300.32(a)(1) and (2), and  
15 300.71. For example, if a political party committee pays an Internet advertising company  
16 to place a pop-up ad on a certain website, or to place the pop-up ad in a manner that it  
17 will be triggered based on some other action of a computer user, the political party  
18 committee – not the advertising company or the website owner – would be subject to the  
19 applicable restrictions on “public communications.” The Commission also notes that, as  
20 with other media included in the definition of “public communication,” the obligation to  
21 ensure that permissible sources are used rest with the entity whose funding is restricted  
22 by the FECA, and not the Web provider.

1 F. Bloggers Not Addressed Separately

2           In the NPRM, the Commission noted that its proposed regulations were unlikely  
3 to cover blogging activities. Nevertheless, the Commission asked whether it should  
4 revise the proposed rule to explicitly exclude all “blogs” from the definition of “public  
5 communication.” Each of the bloggers who testified at the hearing, and the majority of  
6 commenters who addressed this issue, warned against crafting a regulation tied to  
7 specific forms of Internet communication like blogging. One commenter noted that  
8 while at present blogs might be readily distinguished from other websites based on  
9 particular software used to generate the blog, that software is likely to change. Moreover,  
10 this commenter noted that other forms of communications, such as peer-to-peer  
11 “podcasting,”<sup>33</sup> may soon replace blogs as the ubiquitous format for low-cost Internet  
12 discussion and debate. Another commenter cautioned that providing special protection  
13 for bloggers might disadvantage others engaged in different yet analogous forms of  
14 Internet communication.

15           In light of the evolving nature of Internet communications, the Commission is not  
16 explicitly excluding from the definition of “public communication” any particular  
17 software or format used in Internet communications. The final rules already exclude  
18 ordinary blogging activity from the definition of “public communication” because blog  
19 messages are not placed for a fee on another person’s website. Thus, an explicit  
20 exclusion focused on “blogging” is not only unnecessary but also potentially confusing to  
21 the extent that it implies that other forms of Internet communication, such as podcasting

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<sup>33</sup> “Podcasting” is a form of file distribution that is currently used primarily to distribute audio files, like a radio program, over the Internet in a format that can be received and played through an Apple iPod or similar device. See <<http://www.ipodder.org/whatIsPodcasting>> (last visited 3/24/06).

1 or e-mailing, might be regulated absent an explicit exclusion for each different form of  
2 Internet communication.

3 G. Paid Advertising On a Website Is a Form of “General Public Political Advertising”  
4 Even Where the Website Is Only Available To the Restricted Class of a Corporation Or  
5 Labor Organization, Or the Members of a Membership Organization

6 The revision to the definition of “public communication” does not affect the  
7 regulations governing corporate or labor organization communications within and outside  
8 of its restricted class,<sup>34</sup> or with the ability of a membership organization to communicate  
9 with its members on any subject.<sup>35</sup> The Commission sought comment, however, on the  
10 appropriate treatment of advertisements placed for a fee by a third-party advertiser on a  
11 corporation’s or labor organization’s website that is solely available to its restricted class,  
12 or on a membership organization’s website available only to its members. Specifically,  
13 the Commission asked whether such advertisements should be excluded from the  
14 definition of “public communication.” NPRM at 16971. For example, if a political party

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<sup>34</sup> The “restricted class” of a corporation is its stockholders and executive or administrative personnel, and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families. 11 CFR 114.1(j); see also 11 CFR 114.1(c). The “restricted class” of a labor organization is its members and executive or administrative personnel, and their families. Id.  
<sup>35</sup> Under the Act and Commission regulations, corporations and labor organizations may communicate with members of their restricted class on “any subject.” See 2 U.S.C. 431(9)(B)(iii) and 441b(b)(2)(A); 11 CFR 100.134(a) and 114.3(a); see also Advisory Opinion 1997-16. Membership organizations may similarly communicate with their members. Id. Corporations, labor organizations, and membership organizations are generally prohibited, however, from making communications to the general public in connection with a Federal election, but they may publicly endorse Federal candidates on their websites in the normal course of releasing a press release so long as the press release is distributed in the normal manner and the organizations make efforts to allow only de minimis exposure of their websites beyond their restricted classes. See 11 CFR 114.4(c)(6) and Advisory Opinion 1997-16. Thus, corporations, labor organizations, and membership organizations may expressly advocate the election or defeat of a clearly identified Federal candidate on the corporate or labor organization websites that are solely available to their respective restricted class. See discussion of revisions to 11 CFR 100.132 in section IX, below, and 11 CFR 114.5(g); see also Advisory Opinions 2000-07 (corporation permitted to solicit its restricted class by providing a password to members of the restricted class and limiting access to its website solely to those password holders) and 1997-16 (membership organization prohibited from making a list of candidate endorsements available on its websites unless it limited access to the list to its members only).

1 committee pays to place an advertisement on a labor organization’s password-protected  
2 website that is available only to that labor organization’s restricted class, should that  
3 advertisement be considered a “public communication”?

4           The Commission concludes that it should. There is no basis in the Act or the  
5 Shays District decision to justify such an exception to the definition of “public  
6 communication.” Moreover, three of the four commenters addressing this issue opposed  
7 a special exclusion on the grounds that a third-party advertiser does not have a special  
8 relationship with members of the restricted class of a corporation or labor organization  
9 that could justify treating website advertisements to this group of individuals differently  
10 than other paid Internet advertisements.<sup>36</sup> One of these commenters, a labor organization,  
11 explained that “by definition, the payor of this sort of political advertising is a stranger to  
12 the restricted class that is the audience, and because that is so, we do not believe that  
13 under that circumstance a blanket exemption would be appropriate.”

14           The Commission agrees that the relationship between a third-party advertiser and  
15 members of a corporation’s or labor organization’s restricted class, or members of a  
16 membership organization, is not sufficiently distinctive to warrant a special exception to  
17 the definition of “public communication.” Therefore, a paid Internet advertisement is a  
18 “public communication” even if the advertisement is available only to the restricted class  
19 of a corporation or labor organization, or the members of a membership organization.

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<sup>36</sup> The other commenter addressing the issue supported an exception covering communications “from corporations and labor organizations to their restricted classes.” These communications, however, would not result in a “public communication” under the proposed or final rules because they are not communications placed on another person’s website for a fee.

1 H. Electronic Mail is Not a Form of “General Public Political Advertising”

2           The definition of “public communication” proposed in the NPRM did not  
3 encompass any e-mail communications. None of the commenters specifically addressed  
4 this aspect of the proposed rule, other than to state their general agreement with the  
5 limited scope of the proposed rule.

6           The Commission does not consider e-mail to be a form of “general public  
7 political advertising” because there is virtually no cost associated with sending e-mail  
8 communications, even thousands of e-mails to thousands of recipients, and there is  
9 nothing in the record that suggests a payment is normally required to do so.<sup>37</sup> All of the  
10 forms of “public communication” expressly listed by Congress normally involve at least  
11 some charge for delivery, such as telephone charges or postage.

12           In addition, Congress does not view e-mail in the same manner as mass mailings.  
13 The House of Representatives’ franking rules place various franking restrictions on an  
14 “unsolicited mass communication,” which relies on a threshold (500 or more  
15 communications) that is identical to the threshold in “mass mailing” at 2 U.S.C. 431(23).  
16 Although mass e-mail communications were subject to the restrictions at the time BCRA  
17 was enacted, on September 5, 2003, the Committee on House Administration revised its  
18 own franking rules to remove mass e-mail communications from the list of “unsolicited  
19 mass communications” requiring pre-authorization from the Franking Committee. See  
20 “Meeting to Approve New Electronic Communications Policy” at

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<sup>37</sup> Numerous e-mail service providers, such as Hotmail, Google, and Yahoo!, provide free Web-based e-mail accounts that permit a user to receive and send thousands of e-mail messages without charge. See <<http://join.msn.com/?page=hotmail/plans&pgmarket>> (last visited 3/24/06), <<http://mail.google.com/mail/help/about.html>> (last visited 3/24/06), <[http://dir.yahoo.com/Business\\_and\\_Economy/Business\\_to\\_Business/Communications\\_and\\_Networking/Internet\\_and\\_World\\_Wide\\_Web/E-mail\\_Providers/Free\\_E-mail](http://dir.yahoo.com/Business_and_Economy/Business_to_Business/Communications_and_Networking/Internet_and_World_Wide_Web/E-mail_Providers/Free_E-mail)> (last visited 3/24/06).

1 <<http://www.access.gpo.gov/congress/house/house08bm108.html>>. While not  
2 controlling in this rulemaking, the e-mail exclusion is indicative of a Congressional view  
3 that e-mail is appropriately regulated differently than postal mail. Accordingly, the  
4 revised definition of “public communication” does not encompass e-mail  
5 communications.

6 I. Costs of Producing Videos and Other Content for Communications

7 Under the Commission’s revised rules at 11 CFR 100.26, posting a video on a  
8 website does not result in a “public communication” unless it is placed on another  
9 person’s website for a fee. Nevertheless, one group of commenters called on the  
10 Commission to clarify the treatment of expenses by State, district or local party  
11 committees for the production costs of videos and other content displayed only on those  
12 committee’s own websites. The commenters observed that the Commission generally  
13 treats the costs of producing campaign-related materials as subject to the same funding  
14 limits and source prohibitions as the costs of distributing the materials. For example, the  
15 direct costs of producing an “electioneering communication” are treated the same as the  
16 costs of distributing the communication and are included within the costs of that  
17 communication. 11 CFR 104.20(a)(2) (“costs charged by a vendor, such as studio rental  
18 time, staff salaries, costs of video or audio recording media, and talent.”)

19 Because the Commission is promulgating regulations that will place funding  
20 limits and source prohibitions on some specific content when it is placed for a fee on a  
21 third-party’s website, a State party committee that pays to produce a video that PASOs a  
22 Federal candidate will have to use federal funds when the party committee pays to place  
23 the video on the website operated by another person. This is entirely consistent with how

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1 the party committee would be required to pay for a communication that it distributes  
2 through television or any other medium that is a form of “public communication.” In  
3 such circumstances, the party committee must pay the costs of producing and distributing  
4 the video entirely with Federal funds. See 11 CFR 300.32(a)(2).

5 J. No Separate Definition of “Public Communication” for Websites of State, District, and  
6 Local Party Committees

7 Although the revised definition of “public communication” encompasses only  
8 those Internet communications that are placed for a fee on another person’s website, the  
9 NPRM sought comment on whether the definition should be further expanded to  
10 encompass all websites of State, district, and local party committees. The Commission  
11 concludes that it should not.

12 BCRA defines “Federal election activity” to include “a public communication that  
13 refers to a clearly identified candidate for Federal office . . . and that promotes or  
14 supports a candidate for that office, or attacks or opposes a candidate for that office[.]” 2  
15 U.S.C. 431(20)(A)(iii) (emphasis added); see also 11 CFR 100.24(b)(3). State, district,  
16 and local political party committees and organizations and their agents, as well as State  
17 and local officeholders and candidates and their agents, are prohibited from using any  
18 non-Federal funds to pay for this type of Federal election activity. See 2 U.S.C. 441i(b)  
19 and (f); 11 CFR 100.24(b)(3) and (c)(1), 300.32(a)(1) and (2), and 300.71.

20 In the NPRM, the Commission explained that one reason it had originally  
21 excluded Internet activities from the definition of “public communication” in 11 CFR  
22 100.26 was to permit State, district, and local party committees to refer to their Federal  
23 candidates on the committees’ own websites or post generic campaign messages without

1 requiring that the year-round costs of maintaining the website be paid entirely with  
2 Federal funds. NPRM at 16971. The record in this rulemaking demonstrates that State,  
3 district, and local party committees generally use their websites to promote a variety of  
4 party policies and candidates, and that these websites are not predominantly focused on  
5 Federal elections. Furthermore, given the ease of adding new Web pages to a website or  
6 altering the content of existing Web pages, both the number of Web pages within a  
7 website and the content of those pages change frequently, sometimes daily or even  
8 hourly. For example, a Federal candidate might be featured on a hyperlink from the  
9 home page of a State party committee website one day, but that hyperlink may be  
10 removed the next day as the party committee replaces it with a more current story.

11         One commenter supporting the proposed rule argued that it would be difficult, if  
12 not impossible, to identify a severable “Federal” portion of a State party committee  
13 website in light of a State party committee’s frequent changes to its website content. Not  
14 only would the determination of the appropriate portion require a snapshot of a website at  
15 one particular time that would render the result somewhat arbitrary and inaccurate in light  
16 of the frequently changing content on the website, but it could also be easily manipulated  
17 because of the ease and low cost of generating new Web pages. For example, any  
18 percentage-based system (percentage of Web pages or Web space dedicated to Federal  
19 candidates) would require a calculation of the total number of Web pages or files  
20 comprising the party committee website. The logistical hurdles to this approach, coupled  
21 with the difficulty in determining the costs to be allocated, underscore the Commission’s  
22 decision not to proceed in this fashion.

1           The commenter also warned that treating a State, district, or local party committee  
2 website as a “public communication” would deter these party committees from featuring  
3 Federal candidates or participating in generic campaign activity at all on their websites.  
4 The commenter explained that even if a party committee’s website PASOs a Federal  
5 candidate on only a small portion of its website, such as a few lines on one Web page for  
6 a period of a few days, the committee would have to file monthly reports with the  
7 Commission for the remainder of the calendar year.<sup>38</sup>

8           Three other groups of commenters, however, advocated for a definition of “public  
9 communication” that included the individual websites of State, district and local party  
10 committees. They argued that the term “general public political advertising” should be  
11 defined differently with respect to different speakers, applying a broad definition of  
12 “general public political advertising” to encompass less activity by individuals but more  
13 Internet activity by State, district, and local party committees, other political committees,  
14

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<sup>38</sup> No commenters or witnesses supplied comments that would assist the Commission in determining how a State, district, or local party committee would pay for a website that was captured under the definition of “public communication.” The statute and regulations do not require a local party committee to pay for all of its public communications with federal funds, only those that support, promote, attack or oppose a federal candidate or contain generic campaign activity.

The Commission asked in its NPRM how the organizations would go about allocating the costs associated with the website if the Commission determined that websites for these organizations are “public communications.” Some commenters who supported including state, district and local party committee websites in the definition of “public communication” suggested that a time/space allocation would be appropriate. However, the Commission is not convinced that the statute permits time/space allocation of any “public communication” that features PASO information about a federal candidate. The existence of PASO would require the organizations to pay for the “public communications,” i.e., the website itself, entirely with hard dollars. Such a result is inconsistent with the Act’s regulation of Federal, but not non-Federal activity. For example, such a determination could have a ripple effect on the payment of other costs. The acquisition of the computers or the phone line (two costs that are generally allocated as administrative expenses) arguably could become expenses that would be required to be paid for entirely with Federal funds because one of the uses of the equipment would be to access or maintain a website.

1 corporations, and labor organizations.<sup>39</sup> One group asserted that State, district and local  
2 party committees should be particularly restricted by a broad definition of “public  
3 communication” because Congress used the term “public communication” in BCRA to  
4 restrict the use of non-Federal funds by State, district, and local party committees. See 2  
5 U.S.C. 431(20)(A)(iii) and 441i(b).

6 The Commission disagrees with these latter commenters and is not including  
7 content placed by a State, district, or local party committee on its own website within the  
8 definition of “public communication.” As explained above, a political party committee’s  
9 website cannot be a form of “public communication” any more than a website of an  
10 individual can be a form of “public communication.” In each case, the website is  
11 controlled by the speaker, the content is viewed by an audience that sought it out, and the  
12 speaker is not required to pay a fee to place a message on a website controlled by another  
13 person.

14 More importantly, Congress defined “public communication” in terms of the  
15 types of media used to convey a message (e.g., newspaper, magazine, broadcast, mass  
16 mailing, phone bank), not the identity of the speaker using that media. 2 U.S.C. 431(22).  
17 There is simply no statutory support for defining “public communication” differently for  
18 different persons, whether they be individuals, groups, or political party committees.

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<sup>39</sup> One of these commenters called for limited rules focused exclusively on communications coordinated with corporations, while excluding all other communications. A different commenter urged the Commission to establish a separate rule for communications by State party committees on the grounds that “campaign finance laws provide for different levels of regulation of individuals, corporations and labor unions, and political committees (including party committees).” The four principal Congressional sponsors of BCRA asserted that the definition of “general public political advertising” applicable to State party committees should encompass all Internet communications “intended to be seen by the general public.” Similarly, a different group of commenters stated that a political committee should be deemed to make a “public communication” whenever it “spends funds to communicate broadly over the Internet – buying Web site ads, sending e-mails, maintaining its own publicly accessible Web site - . . . just as if it were spending funds to communicate by broadcast or mass mailing.”

1 Instead, because Congress provided only one broadly applicable definition of “public  
2 communication,” the Commission is not free to conclude that a communication made  
3 through the same media is a “public communication” when made by an individual, but  
4 not when made by a political committee. Conversely, the Commission cannot conclude  
5 that a communication is not a “public communication” when made by an individual, but  
6 is a “public communication” if made by a party committee through the same media.

7 The definition of “public communication” at 2 U.S.C. 431(22) is just that: a  
8 definition. Congress could have, but did not, define the “public communication”  
9 differently with respect to different speakers. Instead, Congress chose to distinguish  
10 between different speakers only when establishing the consequences of making a “public  
11 communication.” The different treatment of different speakers is therefore provided  
12 separately in the Act, rather than in the definition of “public communication” itself. See  
13 2 U.S.C. 431(20)(A)(iii) (including “public communication” in the definition of “Federal  
14 election activity”), 2 U.S.C. 441i(b) and (f) (prohibiting State, district, and local party  
15 committees, and State and local candidates, but not other political committees or  
16 individuals other than candidates or officeholders, from paying for Federal election  
17 activity with non-Federal funds), and 2 U.S.C. 434(e)(2) (requiring State, district, and  
18 local party committees to report receipts and disbursements for FEA that total at least  
19 \$5,000 per calendar year.)

20  
21 **IV. 11 CFR 100.25 – Definition of “Generic Campaign Activity” Is Not Changed**

22 BCRA defines “generic campaign activity” as “campaign activity that promotes a  
23 political party and does not promote a candidate or non-Federal candidate.” 2 U.S.C.  
24 431(21). In 2002, as part of a rulemaking implementing BRCA, the Commission defined

1 “generic campaign activity” to mean “a public communication that promotes or opposes a  
2 political party and does not promote or oppose a clearly identified Federal candidate or a  
3 non-Federal candidate.” 67 FR 49064, 49111; 11 CFR 100.25 (emphasis added). The  
4 Act requires State, district, and local party committees that conduct “generic campaign  
5 activity” in connection with an election in which a candidate for Federal office appears  
6 on the ballot to finance such activities with Federal funds or a mix of Federal funds and  
7 Levin funds. 2 U.S.C. 441i(b) and 431(20)(A); 11 CFR 100.24 and 300.33.

8 As noted above, the Shays District court remanded the Commission’s definition  
9 of “generic campaign activity” on two grounds: first, that by incorporating the  
10 Commission’s definition of “public communication” it improperly excluded all Internet  
11 communications, and second, for lack of notice to the public that the definition would be  
12 limited to “public communications” as defined in 11 CFR 100.26. The Commission did  
13 not appeal these holdings.

14 The Commission is addressing the Shays District court’s first concern by revising  
15 the definition of “public communication” to include paid advertisements placed on  
16 another person’s website, as explained above. The Commission has addressed the Shays  
17 District court’s second concern by providing ample notice in the NPRM that it was  
18 considering defining “generic campaign activity” in terms of a “public communication.”  
19 Therefore, the Commission is adopting a final rule that has the same language as the  
20 previous rule and the rule proposed in the NPRM.

21 Two commenters addressed the Commission’s proposal to retain the current  
22 definition of “generic campaign activity.” Both commenters urged the Commission to  
23 adopt a definition that includes activities beyond “public communications.” One

1 commenter suggested that the proposed definition of the term “generic campaign  
2 activity” would improperly narrow the application of the term, thereby permitting State,  
3 district, and local party committees to use non-Federal funds for many activities that  
4 promote the political party (and thereby indirectly promote the party’s Federal  
5 candidates), because the promotion does not occur in a “public communication.”  
6 Specifically, this commenter urged the Commission to adopt a broader definition, one  
7 covering “all generic ‘activities’” of State, district, and local political party committees,  
8 such as phone banks and mailings to 500 or fewer people, and State, district, and local  
9 political party websites.

10       The Commission does not believe that expanding the definition of “generic  
11 campaign activity” beyond “public communication” is a sound policy decision or the  
12 result required by the Act. First, the Commission has not seen any evidence that its 2002  
13 definition of “generic campaign activity” has led to circumvention of the Act or fostered  
14 corruption or the appearance thereof, nor did the commenters point to any specific real-  
15 world examples where the definition of “generic campaign activity” has proven too  
16 narrow. Second, a broad definition of “generic campaign activity” would exceed the  
17 scope of the Act and pose Constitutional concerns by capturing State, district, and local  
18 party activities designed to support only State or local candidates, thereby improperly  
19 requiring that State, district, and local parties finance these activities with at least some  
20 Federal funds. For example, a State party committee that rents a bus to transport the  
21 party’s slate of candidates for the State’s executive offices during a State election  
22 occurring contemporaneously with a Federal election, would be required to use Federal  
23 funds or a mix of Federal and Levin funds to pay for the bus because providing the bus

1 would constitute support of the party and its choice of candidates without clearly  
2 identifying any of the candidates. The Commission does not consider these results to be  
3 required by the Act.

4 The commenters also argued that the use of the term “public communication”  
5 creates a definition of “generic campaign activity” that is too narrow because it does not  
6 cover all communications, specifically “mailing and phone banks directed to fewer than  
7 500 [sic] people.” The plaintiffs in Shays District made this same argument. The  
8 Commission countered that under such an argument, a series of substantially similar  
9 telephone calls made to 500 or fewer persons could be regulated as FEA if they promote  
10 a political party, even if they do not mention Federal candidates, whereas the same  
11 number of substantially similar telephone calls that do promote or oppose a specific  
12 Federal candidate would not be regulated as FEA.<sup>40</sup> The Shays District court specifically  
13 rejected the plaintiff’s argument and agreed with the Commission’s reasoning, stating:  
14 “It would indeed be anomalous for Congress to have placed greater strictures on activities  
15 that promote political parties than on activities that support or attack a candidate.” Shays  
16 District at 111. Accordingly, the Shays District court found that the Commission’s  
17 definition of “generic campaign activity” was appropriate and reasonable in the context  
18 of FEA, particularly in excluding activities such as small phone banks and mailings. Id.

19 Therefore, the Commission has decided to retain the current definition of “generic  
20 campaign activity” at 11 CFR 100.25. The final rule is unchanged from the language  
21 proposed in the NPRM. “Generic campaign activity” will continue to mean a “public

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<sup>40</sup> A telephone bank that supports or opposes a Federal candidate would be regulated as an additional form of FEA, which is a “public communication” that PASOs a clearly identified Federal candidate. 2 U.S.C. 431(20(A)(iii); 11 CFR 100.24(b)(3).

1 communication,” as defined in 11 CFR 100.26, that promotes or opposes a political party  
2 and does not promote or oppose a clearly identified Federal or non-Federal candidate.

3 **V. 11 CFR 109.21 and 109.37 – Definitions of Coordinated Communications and**  
4 **Party Coordinated Communications**

5 To be a “coordinated communication” or a “party coordinated communication,” a  
6 communication must be a “public communication” as defined in 11 CFR 100.26.<sup>41</sup> See  
7 11 CFR 109.21(c) and 11 CFR 109.37(a)(2). In Shays District, the court rejected the  
8 definition of the term “public communication,” because the effect of the definition was to  
9 exclude all Internet communications from the reach of the coordinated communication  
10 rules. See Shays District at 70.<sup>42</sup>

11 By including Internet advertising placed for a fee on another person’s website in  
12 the definition of “public communication” in 11 CFR 100.26, the Commission is  
13 addressing the deficiency identified by the Shays District court in the coordinated  
14 communication rules. Consequently, the Commission is not amending the language of  
15 the coordinated communication rules in this rulemaking.

16 In the NPRM, the Commission did not propose any changes to the coordinated  
17 communication rule or the party coordinated communication rule. The Commission did,  
18 however, invite comments on a number of issues with respect to the two rules. The  
19 comments that the Commission received generally supported the Commission’s decision

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<sup>41</sup> As noted above, an “electioneering communication” may also be a coordinated communication. See 2 U.S.C. 441a(a)(7)(C); 11 CFR 109.21(c)(1). However, electioneering communications are a subset of public communications.

<sup>42</sup> The Court of Appeals found that the Commission had provided inadequate justification under the APA for excluding from the coordinated communication rules certain public communications that are publicly distributed or otherwise publicly disseminated more than 120 days before an election. See Shays Appeal at 100. The Commission initiated a separate rulemaking on the coordinated communication rules to address that issue. See Coordinated Communication Notice of Proposed Rulemaking, 70 FR 73946 (Dec. 14, 2005). The Shays Appeal decision did not address the definition of “public communication.”

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1 to reconsider the coordinated communication rules in a separate rulemaking dedicated to  
2 that purpose.

3 A. In-kind Contributions

4 The Commission would also like to reiterate that current regulations at 11 CFR  
5 100.52(d)(1) make clear that the provision of goods or services “without charge or at a  
6 charge that is less than the usual or normal charge for such goods or services” is a  
7 contribution. The Commission does not view the “public communication” rule it is  
8 promulgating to permit vendors who normally charge for advertising space to provide  
9 such ad space at a reduced charge or free of charge without making a contribution.

10 While the Commission recognizes that online business practices for the charging  
11 of ad space vary greatly from one website to the next, the Commission would also like to  
12 make clear that when the customary business practice of a particular website regarding  
13 the payment for space is not followed, the vendor is making an in-kind contribution. This  
14 is similarly the case when any organization transfers to a political committee a tangible  
15 asset, such as an email list. There is no need to show that a coordinated communication  
16 resulted from such a transfer for the actual asset to be an in-kind contribution to that  
17 committee.

18 B. Republication of Campaign Materials

19 The Commission sought comment about the republication of candidate campaign  
20 materials on the Internet. Under the existing coordinated communication rules, the  
21 content prong can be satisfied by a “public communication that disseminates, distributes,  
22 or republishes, in whole or in part, campaign materials prepared by a candidate, the  
23 candidate’s authorized committee, or an agent of any of the foregoing.” 11 CFR

1 109.21(c)(2). Several commenters urged the Commission to ensure that the republication  
2 of content from a candidate's website, or the republication of other campaign materials  
3 prepared by candidate, would not result in a "coordinated communication" when the  
4 republication occurs on a blogger's or individual's own website.

5 Testimony submitted during the rulemaking indicated that the approach outlined  
6 in the NPRM would be appropriate. As one of the lawyers for the Plaintiffs in the Shays  
7 litigation pointed out, the restrictions on republication of campaign materials were not  
8 promulgated with the Internet in mind. Because an individual need not incur any cost in  
9 downloading information derived from a candidate's website and reproducing that same  
10 information on a different website, republication on the Internet is fundamentally  
11 different from republication in other contexts, such as if an individual were to pay to  
12 reprint a candidate's campaign literature.

13 The revision to the definition of "public communication" in 11 CFR 100.26  
14 adequately addresses those commenters' concerns, so no changes are required to the  
15 definition of "coordinated communication." The definition of "public communication"  
16 does not encompass any content, including republished campaign material, that a person  
17 places on his or her own website. Therefore, a person's republication of a candidate's  
18 campaign materials on his or her own website, blog, or e-mail cannot constitute a  
19 "coordinated communication."

20 The Commission is taking this approach partly in recognition of the ease with  
21 which individuals are able to transmit information over the Internet. Exchanging  
22 hyperlinks, forwarding email, and attaching downloaded PDF files are common ways  
23 most individuals who use the Internet exchange information. The Commission is taking

1 this opportunity to make clear that such activity would not constitute in-kind  
2 contributions. The Commission notes that Senator Russ Feingold, one of BCRA’s  
3 sponsors, stated recently that “linking campaign Web sites, quoting from, or republishing  
4 campaign materials and even providing a link for donations to a candidate, if done  
5 without compensation, should not cause a blogger to be deemed to have made a  
6 contribution to a campaign or trigger reporting requirements.”<sup>43</sup>

7         However, if a person pays to republish a candidate’s campaign materials on  
8 another person’s website, a “public communication” would result under revised 11 CFR  
9 100.26, and such paid republication would therefore satisfy the content prong of the  
10 three-pronged “coordinated communication” test. For example, if a candidate pays to  
11 place a banner advertisement on the WashingtonPost.com homepage for one week, and  
12 then a different person pays the WashingtonPost.com for the continued display of the  
13 same advertisement for an additional week, the content prong of the “coordinated  
14 communication” test would be satisfied. The Commission notes, however, that  
15 satisfaction of the content prong does not, in and of itself, translate into a coordinated  
16 communication finding. The conduct prong must also be satisfied. See 11 CFR  
17 109.21(d)

18         The Commission also notes that this provision does not supersede the limitations  
19 and prohibitions placed on disbursements for communications by corporations and labor  
20 organizations under 2 U.S.C. 441b and 11 CFR Part 114.

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<sup>43</sup> Senator Russ Feingold, “Blogs Don’t Need Big Government” available at  
<<http://www.mydd.com/story/2005/3/10/112323/534>> (last visited 3/24/06).

1 **VI. 11 CFR 110.11 – Scope of Disclaimer Requirements**

2 The Commission’s disclaimer rules promulgated in 2002 apply to “public  
3 communications,” as defined in 11 CFR 100.26, as well as to two specified additional  
4 types of Internet communications: unsolicited electronic mail of more than 500  
5 substantially similar communications and Internet websites of political committees  
6 available to the general public. See 11 CFR 110.11(a); see also 2 U.S.C. 441d(a).

7 Whether a “public communication” requires a disclaimer depends on who makes  
8 the “public communication” and what the “public communication” says. A political  
9 committee must include a disclaimer on any “public communication” for which it makes  
10 a disbursement, as well as on all of its publicly available websites and on all substantially  
11 similar, unsolicited e-mail communications to more than 500 people. See 11 CFR  
12 110.11(a)(1). Under the 2002 rule, when persons other than political committees make a  
13 “public communication” or send substantially similar e-mail messages to more than 500  
14 persons, they need only include disclaimers when those communications expressly  
15 advocate the election or defeat of a clearly identified candidate for Federal office, solicit  
16 contributions, or qualify as “electioneering communications” under 11 CFR 100.29. See  
17 11 CFR 110.11(a)(2)-(4). Persons other than political committees are not required to  
18 include disclaimers on their websites.

19 A. Disclaimer Requirements for Websites

20 Although the disclaimer rule was not at issue in Shays, the Commission noted in  
21 the NPRM that because a disclaimer is required for a certain class of “public  
22 communication” as defined in 11 CFR 100.26, the revision to the definition of “public  
23 communication” in 11 CFR 100.26 would affect the scope of the disclaimer requirement.

1 The Commission received several comments stating that it would be appropriate to  
2 require disclaimers for certain “public communications” that take place over the Internet,  
3 provided that the definition of “public communication” was limited to advertisements  
4 placed for a fee on another person’s website as proposed in the NPRM.

5 Moreover, Congress has required disclaimers for all forms of “general public  
6 political advertising” that contain certain content or are paid for by a political committee.  
7 2 U.S.C. 441d(a). As the Commission explained in its original post-BCRA disclaimer  
8 rulemaking, the use of the same catch-all phrase in the definition of “public  
9 communication” and the disclaimer requirements “should be interpreted in a virtually  
10 identical manner.”<sup>44</sup> See 2 U.S.C. 441d(a) and 431(22). The Commission is therefore  
11 retaining the disclaimer requirement for any “public communication” that includes the  
12 content specified in 11 CFR 110.11(a).

13 In their comments, the Congressional sponsors of BCRA urged the Commission  
14 to retain the current additional requirement that all political committee websites include  
15 disclaimers. The Commission did not receive any other comments specifically  
16 addressing the disclaimer requirement for political committee websites, and did not  
17 propose changing that requirement in the NPRM. Accordingly, under the revised rules at  
18 11 CRR 110.11, all political committee websites must continue to include the appropriate  
19 disclaimer statements.

20 This treatment of political committee websites is consistent with Congress’s  
21 broader disclaimer requirements for political committees. In 2 U.S.C. 441d(a), Congress  
22 required a disclaimer “[w]henver a political committee makes a disbursement” for a  
23 class of communications, regardless of the content of the communication. In contrast, for

1 all other persons, Congress only required a disclaimer if the communication contains  
2 specific content, such as a solicitation of contributions or a message expressly advocating  
3 the election or defeat of a clearly identified candidate for Federal office. Id.

4 B. No Disclaimer Required for Electronic Mail Unless Sent by a Political Committee

5 In the NPRM, the Commission also proposed changing the disclaimer  
6 requirement for e-mail communications. The Commission noted that it had originally  
7 promulgated the regulatory requirement that disclaimers appear on large quantities of e-  
8 mail communications in an effort to focus on “spam”<sup>45</sup> e-mail. NPRM at 16972. The  
9 Commission also stated that it had become “concerned that the current regulation  
10 emphasizes the number of e-mail communications sent, rather than focusing on whether  
11 an expenditure was made that would justify governmental regulation.” Id. In addition,  
12 the Commission expressed concern “that the lack of a definition of the term ‘unsolicited’  
13 could have the effect of discouraging individuals from engaging in discussion and  
14 advocacy that is core political speech protected by the First Amendment and that is  
15 virtually cost-free.” Id. Accordingly, while maintaining the requirement that a  
16 disclaimer appear on more than 500 substantially similar unsolicited e-mail  
17 communications, the Commission proposed defining the term “unsolicited e-mail” as e-  
18 mail “sent to electronic mail addresses purchased from a third party.” Id.

19 The commenters had mixed reactions to the Commission’s proposal. Although  
20 they generally supported limiting the disclaimer requirement for e-mail communications  
21 to e-mail communications sent to a purchased or rented list, many commenters raised

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<sup>44</sup> See Disclaimer Final Rules, 67 FR at 76963.

<sup>45</sup> “Spam” is a common term for “bulk e-mail sent out over the Internet. These messages are often unsolicited and unwanted by the recipient.” Modern Dictionary for the Legal Profession, 866 (3rd ed. 2001).

1 concerns about the proposed definition of “unsolicited e-mail.” One commenter asserted  
2 that the proposed definition would be confusing, because it differed from the commonly  
3 accepted meaning of the term “unsolicited e-mail,” which is not limited to e-mail  
4 communications sent to addresses purchased from a third party. A second commenter  
5 felt that the proposed definition was too narrow, and urged the Commission to expand it  
6 to include communications sent to an e-mail list provided by a candidate or political  
7 committee, regardless of whether the list was provided as part of a commercial  
8 transaction. A third commenter felt that the proposed definition was too broad, and urged  
9 the Commission not to require disclaimers on e-mail involving less than some minimum  
10 cost. A fourth commenter felt that the Commission should not attempt to regulate  
11 unsolicited e-mail at all, because of the lack of evidence that political e-mail was “a tool  
12 of big money” or otherwise harmful, while a fifth commenter urged the Commission to  
13 require disclaimers on all e-mail sent by any candidate, political party committee,  
14 political committee, or third party who “paid to send electioneering e-mail.”

15         Commenters also raised concerns about the quantity threshold (ie., “more than  
16 500”) for e-mail communications to trigger the disclaimer requirement. Although one  
17 commenter supported maintaining a numerical threshold to serve as a “bright line rule,”  
18 another suggested eliminating the threshold entirely and requiring disclaimers on e-mail  
19 sent to any address that had been purchased for the purpose of engaging in “political  
20 spam,” regardless of the number involved. Still others urged the Commission to replace  
21 the quantity threshold with a monetary threshold; suggestions for the monetary threshold  
22 ranged from \$250 to \$25,000 in expenditures for e-mail communications.

1           Several commenters voiced concerns about implementing the Commission’s  
2 proposal. One commenter, for example, raised the issue of whether disclaimers would be  
3 permanently required for any e-mail communication sent to addresses originally acquired  
4 through a commercial transaction. Noting that his and other organizations often rented  
5 lists of e-mail addresses, the commenter asked, “Does that mean that four months down  
6 the line, when we’ve been having ongoing communication [with a person whose e-mail  
7 address was on the rented list,] that because we rented the list originally, and the name  
8 was produced through a rented list[,] that . . . we have to put a disclaimer on e-mail to  
9 [that person]?” The commenter also noted that the proposed rule could raise  
10 recordkeeping issues for organizations that obtain e-mail addresses through a  
11 combination of purchase or rental and other means.

12           Commenters also raised concerns about enforcing the disclaimer requirement on  
13 e-mail, particularly given the high volume of e-mail traffic and the low cost of sending  
14 large numbers of e-mail communications. In addition, some commenters questioned the  
15 Commission’s rationale for requiring individuals to place disclaimers on unsolicited e-  
16 mail communications containing express advocacy or soliciting contributions, but not to  
17 require disclaimers on Internet blogs containing the same message. Several commenters  
18 suggested that the Commission simply eliminate the disclaimer requirement for e-mail  
19 communications.

20           The Commission agrees with some of the concerns expressed by the commenters  
21 and has decided to change 11 CFR 110.11(a) by eliminating the requirement that  
22 disclaimers appear on e-mail communications by persons other than political

1 committees.<sup>46</sup> The Act does not expressly or implicitly require that disclaimers appear on  
2 e-mail communications. Congress used virtually the same language in the disclaimer  
3 provisions and in the definition of “public communication,” particularly with respect to  
4 the phrase “or any other [type/form] of general public political advertising,” and the  
5 Commission has previously concluded that the two phrases “should be interpreted in a  
6 virtually identical manner.” See 2 U.S.C. 441d(a) and 431(22); Disclaimer Final Rules at  
7 76963. As discussed above, the Commission is changing the definition of “public  
8 communication” to reflect the Commission’s conclusion that the only form of “public  
9 communication” on the Internet is advertising that appears for a fee on another person’s  
10 website. See Part III, above.

11           A political committee, however, must continue to include a disclaimer whenever  
12 it sends more than 500 substantially similar e-mail communications. As noted above,  
13 Congress requires disclaimers on a broader class of communications for political  
14 committee than for all other persons. Since 2002, the Commission has required  
15 disclaimers for “unsolicited electronic mail of more than 500 substantially similar  
16 communications.” 11 CFR 110.11(a). The Commission notes that political committees  
17 have generally complied with this requirement, and that the inclusion of a disclaimer  
18 statement poses only a minimal burden for political committees. Also, the Commission  
19 is not aware of significant concerns that might warrant the removal of this requirement  
20 for political committees at this time. However, in light of confusion that many  
21 commenters expressed regarding the meaning of “unsolicited e-mail,” the Commission is  
22 removing the requirement that e-mail be “unsolicited.”

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<sup>46</sup> See note 23 for definition of “person.”

1           The Commission notes that e-mail communications by corporations and labor  
2 organizations are otherwise regulated by Part 114. See 2 U.S.C. 441b and 11 CFR 114.4.  
3 Generally, these entities are prohibited from sending email in connection with federal  
4 elections outside the restricted class. 2 USC 441b and 11 CFR 114.4.

5 C. Technical Reorganization

6           The Commission is making two other changes to 11 CFR 110.11(a) for purposes  
7 of clarity. First, the Commission is deleting the first sentence from paragraph (a).  
8 Second, the remaining sentence in that paragraph is being revised to provide that  
9 disclaimers are required only on: (1) a “public communication,” as defined in 11 CFR  
10 100.26, made by a political committee; (2) a political committee website available to the  
11 general public; and (3) a “public communication,” as defined in 11 CFR 100.26, made by  
12 any person that contains express advocacy, solicits a contribution, or qualifies as an  
13 electioneering communication under 11 CFR 100.29.

14 D. Bloggers Paid by Candidates

15           The Commission invited comments on whether it should revise the disclaimer  
16 rule in 11 CFR 110.11(a) to require bloggers to disclose payments from a candidate, a  
17 political party, or a political committee. The Commission did not propose any change  
18 because current Commission rules at 11 CFR 110.11(a) already require a political  
19 committee to disclose this type of disbursement on its publicly available reports filed  
20 with the Commission. NPRM at 16973.

21           All but one of the comments received on this subject supported the Commission’s  
22 proposed approach that would not require bloggers to disclose payments received from  
23 candidates. Typical of the reaction was this comment: “The ethics of taking money to

1 express opinions without disclosing those payments can certainly be questioned. But for  
2 purposes of the election laws, . . . no disclaimer should be required. Payments by  
3 campaigns are disclosed by campaigns. To require more of bloggers when others who  
4 receive payments from campaigns are not subject to similar disclosure requirements  
5 would not be fair.”

6         The Commission agrees that the Act does not require a disclaimer when a blogger  
7 or other person accepts payment from a Federal candidate. Accordingly, it is not  
8 changing the disclaimer rule to require bloggers to disclose payments from a candidate, a  
9 political party committee, or other political committee. Please note, however, that  
10 disbursements for particular communications, as opposed to more generalized payments  
11 to bloggers for consulting or other services, might still require disclaimers. For example,  
12 if a candidate or political committee pays a fee to place an advertisement on the website  
13 of a blogger, the advertisement would require a disclaimer because it would be a  
14 disbursement for a “public communication” by a political committee.

15

16 **VII. Other Uses of the Term “Public Communication” in the Commission’s**  
17 **Regulations**

18         The term “public communication” is also used in 11 CFR 106.6(b) and (f)  
19 (allocation of expenses between Federal and non-Federal activities by SSFs and  
20 nonconnected committees) and 11 CFR 300.2(b)(4) (definition of “agent” for non-  
21 Federal candidates). Thus, the revisions to the definition of “public communication” in  
22 amended 11 CFR 100.26 affect the application of these two regulations.

1 A. 11 CFR 106.6 – Allocation of Expenses Between Federal and Non-Federal Activities  
2 by Separate Segregated Funds and Nonconnected Political Committees

3 In 2004, the Commission revised its allocation regulations at 11 CFR 106.6  
4 governing the source of funds for certain “public communications” by SSFs and  
5 nonconnected committees. Whenever either of these entities pays for a “public  
6 communication” that (1) refers to a political party, but does not refer to any clearly  
7 identified Federal or non-Federal candidate, or (2) refers to one or more clearly identified  
8 Federal or non-Federal candidates, the SSF or nonconnected committee must pay for the  
9 communication entirely with Federal funds or by allocating such expenses between its  
10 Federal and non-Federal accounts in accordance with 11 CFR 106.6(b) and (f). See  
11 Political Committee Status Final Rules. Because all Internet communications were  
12 exempted from the definition of “public communication,” SSFs and nonconnected  
13 committees were not required to comply with the new provisions in 11 CFR 106.6 when  
14 funding Internet communications.

15 In the NPRM, the Commission noted that the effect of the proposed revisions to  
16 the definition of “public communication” in 11 CFR 100.26 would be to apply the  
17 allocation rules in 11 CFR 106.6(b)(1), (b)(2), and (f) to those Internet communications  
18 covered by the revised definition of “public communication.” Thus, SSFs and  
19 nonconnected committees would be required to use Federal funds to pay for certain  
20 public communications over the Internet. The Commission invited comment on this  
21 result.

22 The Commission received two comments addressing this issue. Both urged the  
23 Commission not to apply the allocation rules in section 106.6 to communications over the

1 Internet. Both comments expressed concern about whether it would be feasible to  
2 ascertain the costs of the communications to which the allocation rules would apply.

3 Because the revised definition of “public communication” covers only paid  
4 Internet advertising placed on another person’s website, and application of the section  
5 106.6 allocation rules to these communications will be based on readily determinable  
6 costs, the commenters’ concerns are resolved by the new definition in 11 CFR 100.26.  
7 The cost of Internet advertising included within the revised definition of “public  
8 communication” will be as discrete and readily identifiable as the costs of other “public  
9 communications,” and application of the section 106.6 allocation rules to these Internet  
10 communications will therefore not be any more complex than for other forms of  
11 communication covered in the definition of “public communication.” Moreover, the  
12 costs of paid Internet advertising must be allocated under 11 CFR 106.6 only if the SSF’s  
13 or nonconnected committee’s advertising refers to a political party or a clearly identified  
14 Federal candidate or non-Federal candidate.

15 Therefore, the Commission is not amending the language of the allocation rules in  
16 11 CFR 106.6. All SSFs and nonconnected committees must continue to use Federal  
17 funds to pay for all covered forms of “public communication,” which now also includes  
18 paid Internet advertising placed on another person’s website.

19 B. 11 CFR 300.2(b)(4) – Definition of an “Agent” of State and Local Candidates

20 BCRA prohibits candidates for State and local offices, and their agents, from  
21 using non-Federal funds to pay for any “public communication” that PASOs a candidate  
22 for Federal office. See 2 U.S.C. 441i(f). Under the Commission’s regulations, an  
23 “agent” of a candidate for State or local office is a person who has actual authority

1 conferred by that candidate to “spend funds for a public communication,” as defined in  
2 11 CFR 100.26. 11 CFR 300.2(b)(4).

3 In the NPRM, the Commission sought comment on whether further revisions to  
4 the definition of “public communication” are necessary to address its potential effect on  
5 the definition of “agent” in 11 CFR 300.2(b)(4). Specifically, the Commission noted that  
6 as a result of the proposed change to the definition of “public communication,” a person  
7 would be an agent of a State or local candidate if he or she is authorized by that candidate  
8 to pay for any Internet communication that is included within the revised definition of  
9 “public communication.” The Commission received no comments on this issue.

10 The Commission believes that no further revisions to the definition of “agent” in  
11 11 CFR 300.2(b)(4) are necessary to address the effect of the revised definition of “public  
12 communication” in 11 CFR 100.26. The definition of “agent” was based on the  
13 anticipated scope of a principal’s activities. Now that the principal (i.e., a State or local  
14 candidate) is subject to certain restrictions when making one type of Internet  
15 communication, it follows that a corresponding change to the scope of the agent’s  
16 anticipated activities is consistent with the original purpose of the definition of “agent.”  
17 Therefore, a person will continue to be an agent of a State or local candidate if he or she  
18 has actual authority to pay for a “public communication” on behalf of the candidate,  
19 which now includes paid Internet advertising placed on another person’s website.

20

21

1 **VIII. 11 CFR 100.94 and 100.155 – Exceptions to the Definitions of “Contribution”**  
2 **and “Expenditure” for Internet Activity by Individuals**

3           The Act and Commission regulations currently exempt certain activities by  
4 individuals from the definitions of “contribution” and “expenditure.” See 2 U.S.C.  
5 431(8)(B)(i) and (ii); 11 CFR 100.74-100.76 and 100.135-100.136. For example, “the  
6 value of services provided without compensation by any individual who volunteers on  
7 behalf of a candidate or political committee” is not a “contribution” to the candidate or  
8 political committee. 2 U.S.C. 431(8)(B)(i); 11 CFR 100.74. Similarly, “the use of real or  
9 personal property, including a church or community room used on a regular basis by  
10 members of a community for noncommercial purposes, . . . voluntarily provided by an  
11 individual to any candidate or any political committee of a political party in rendering  
12 voluntary personal services on the individual’s residential premises or in the church or  
13 community room for candidate-related or political party-related activities” is not a  
14 “contribution” or “expenditure.” 2 U.S.C. 431(8)(B)(ii). See also 11 CFR 100.75,  
15 100.76, 100.35, and 100.36.

16           The Internet has changed the way in which individuals engage in political activity  
17 by expanding the opportunities for them to participate in campaigns and grassroots  
18 activities at little or no cost and from remote locations. Accordingly, in the NPRM, the  
19 Commission proposed new rules to extend explicitly the existing individual activity  
20 exceptions to the Internet to remove any potential restrictions on the ability of individuals  
21 to use the Internet as a generally free or low-cost means of civic engagement and political  
22 advocacy. See NPRM at 16975-76. Specifically, the Commission proposed two

1 sections, 11 CFR 100.94 and 100.155, to exempt from the definitions of “contribution”  
2 and “expenditure” the value of uncompensated Internet activity by volunteers.

3 All of the numerous commenters addressing this issue supported the  
4 Commission’s proposal and favored a broad exemption from regulation for  
5 uncompensated Internet activity by individuals. The commenters affirmed that  
6 individuals currently use the Internet to engage in both individual and collective  
7 grassroots political activity. As one commenter stated, “[t]he Internet provides  
8 individuals with the ability to engage in widely disseminative political discourse without  
9 requiring the expenditure of large sums of money.” Another commenter stated that  
10 campaigns in the 2004 election cycle “relied to an unprecedented degree on using the  
11 Internet as an organizing tool, both financially as well as [for] an unprecedented number  
12 of volunteers who came to the campaign through the Internet.” This commenter noted  
13 that “[p]eople who volunteered through the Internet . . . were volunteering not because  
14 they thought they were going to get some job in the administration, not because they  
15 wanted to be close to the center of action . . . [but] because they wanted to make a  
16 difference.” A different commenter suggested that “[i]ndividual Americans should be  
17 able to engage in election related political speech online and spend reasonable sums of  
18 their own money to support that speech, without having to disclose their identity,  
19 worrying about whether they are violating campaign finance laws, or having to hire a  
20 lawyer to advise them.”

21 One commenter summarized the general benefit to be derived from the proposed  
22 exceptions: “[a]doption of this rule would in itself address the vast majority of concerns  
23 and objections that have been expressed about this rulemaking. This rule would make

1 clear, appropriately so, that individuals engaging in unfettered political discourse over the  
2 Internet using their own computer facilities (or those publicly available) would not be  
3 subject to regulation under the campaign finance laws, whether or not such activities are  
4 coordinated with a candidate.”

5           After considering all the comments, the Commission is adding new 11 CFR  
6 100.94 and 100.155, which together expressly remove Internet activity by an individual  
7 or group of individuals from the definitions of “contribution” and “expenditure” when the  
8 individual or group of individuals perform uncompensated Internet activities for the  
9 purpose of influencing a Federal election.

10 A. 11 CFR 100.94(a) and 100.155(a) – Exception for Uncompensated Internet Activity

11           Although the final versions of 11 CFR 100.94 and 100.155 are structured  
12 somewhat differently from the rules proposed in the NPRM, they have the same scope  
13 and application. Thus, under these final rules, any individual or group of individuals  
14 who, without compensation, uses Internet equipment and services for the purpose of  
15 influencing a Federal election does not make a contribution or expenditure and does not  
16 incur any reporting responsibilities as a result of that activity.

17           1. Exception not restricted to volunteers known to a campaign

18           In the NPRM, the Commission sought comment on whether the final rules should  
19 apply to all individual Internet activities, regardless of whether such activities are known  
20 to a candidate, authorized committee, or political party committee. The Commission  
21 proposed regulations that would apply regardless of whether the individual’s Internet  
22 activities were known to any of these groups. All commenters addressing this issue  
23 supported the Commission’s proposal. As one commenter stated, “[f]or the sake of

1 clarity, the rule should apply to all ‘individuals,’ whether or not they are ‘volunteers’ for  
2 a campaign that are ‘known’ to the campaign, or employees of a campaign.”

3         The Act does not require that a candidate or political committee formally  
4 recognize an individual as a “volunteer” for that individual’s activities to be exempt from  
5 the definitions of “contribution” and “expenditure.” On the contrary, the plain language  
6 of the Act uses the term “volunteer” as relating to the provision of voluntary and  
7 uncompensated services, rather than the formal status of the actor in relation to a  
8 campaign. See 2 U.S.C. 431(8)(B)(i) (exempting from the definition of “contribution”  
9 “the value of services provided without compensation by an individual who volunteers”)  
10 and 2 U.S.C. 431(8)(B)(ii) (exempting from the definition of “contribution” “the use of  
11 real or personal property . . . voluntarily provided by an individual to any candidate or  
12 any political committee of a political party in rendering voluntary personal services”).  
13 Moreover, one commenter pointed out that, in light of the new opportunities to engage in  
14 political activity through the Internet, “it would be an odd result if a campaign volunteer  
15 was exempt but someone acting independently was not.”

16         The Commission agrees. Therefore, the new rules exempt Internet activity by  
17 individuals acting both with and without the knowledge or consent of a candidate,  
18 authorized committee, or political party committee. The new rules use the phrase “acting  
19 independently” to cover any individual who is unknown to, or acting without the consent  
20 of, a candidate, authorized committee, or political party, and the phrase “in coordination  
21 with” to cover any individual who is a formal or informal volunteer known to, and acting  
22

1 with the consent of, a candidate, authorized committee or political party committee.<sup>47</sup>

2 Finally, commenters raised concerns that the new rules would not apply to groups  
3 of individuals who act collectively. One commenter pointed out that, “While it is true  
4 that any ‘group’ comprises individuals, the plain reading of the [proposed] rule suggests  
5 that only individuals acting ‘individually’ are protected from regulation of ‘contributions’  
6 or ‘expenditure.’”

7 In response to this potential concern, the Commission in the final rules uses the  
8 terms “individual or group of individuals.” Individuals are eligible for the exceptions  
9 whenever they engage in Internet activities for the purpose of influencing a Federal  
10 election alone or collectively through a group of individuals. For example, if several  
11 individuals share the responsibilities of operating a blog or other website, then each  
12 individual would be covered under new 11 CFR 100.94 and 100.155. The Commission  
13 also notes that a group of individuals will not trigger political committee status through  
14 Internet activities covered by the new exceptions because those Internet activities would  
15 not constitute contributions or expenditures under the Act.<sup>48</sup>

## 16 2. Republication

17 In the NPRM, the Commission noted that its proposed regulations would protect  
18 an individual or volunteer who produces or maintains a website or blog, or conducts other

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<sup>47</sup> In Advisory Opinion 1999-17, the Commission concluded that a campaign’s permission “at some level” was essential for the volunteer exception to apply to an individual’s Internet activity on behalf of a presidential candidate. Advisory Opinion 1999-17 is superseded to the extent that it indicates that the campaign or political committee must be aware of or sanction the individual’s Internet activities in order for the individual’s activity to be exempt.

<sup>48</sup> See 11 CFR 100.5 (“Political committee means . . . any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 or which makes expenditures aggregating in excess of \$1,000 during a calendar year”). As discussed below, payments to place advertisements on another person’s website, other than for a nominal fee, are not exempt under the new exceptions for Internet activities by individuals, and such payments could result in expenditures or contributions.

1 grassroots activity on the Internet. The NPRM noted that this activity would not result in  
2 individuals or volunteers making a contribution or expenditure and they would not incur  
3 any reporting responsibilities. For example, if an individual downloaded materials from a  
4 candidate or party website, such as campaign packets, yard signs, or any other items, the  
5 downloading of such items would not constitute republication of campaign materials.

6 Even if this activity is done in cooperation, consultation, or concert with a  
7 candidate or a political party committee, no contribution or expenditure would result, and  
8 neither the candidate nor the political party committee would incur reporting  
9 responsibilities. Additionally, if an individual forwarded an e-mail received from a  
10 political committee, the forwarding of that e-mail would not constitute republication of  
11 campaign materials or be an in-kind contribution. The Commission has chosen to adopt  
12 such an approach in the final rules. In doing so, the Commission recognizes the  
13 importance of grassroots activity and the role of the Internet. Under the final rules at 11  
14 CFR 100.94 and 100.95, individuals are free to republish materials using the Internet  
15 without making a contribution or expenditure. However, the Commission notes that 11  
16 CFR 100.94(e) would not exempt from the definition of “contribution” any “public  
17 communication” that arises as the result of the republication of such materials. For  
18 example, if an individual downloaded a campaign poster from the Internet and then paid  
19 to have the poster appear as an advertisement in the New York Times, the advertisement  
20 in the New York Times would not be within the exemption of the final rules.

21 3. Personal services exempted

22 As was noted above, the Act and Commission regulations exempt certain  
23 activities by individuals from the definitions of “contribution” and “expenditure.” See 2

1 U.S.C. 431(8)(B)(i) and (ii); 11 CFR 100.74–100.76 and 100.135–100.136. For example,  
2 the Act provides that “the value of services provided without compensation by any  
3 individual who volunteers on behalf of a candidate or political committee” is not a  
4 “contribution” to the candidate or political committee. 2 U.S.C. 431(8)(B)(i). See also  
5 11 CFR 100.74. Consistent with these provisions, the narrative accompanying the  
6 exceptions proposed in the NPRM made clear that the value of an individual’s  
7 uncompensated Internet services would be excepted from the definitions of  
8 “contribution” and “expenditure.” See NPRM at 16976. Accordingly, under new 11  
9 CFR 100.94 and 100.155, the value of an individual’s uncompensated time and the value  
10 of any special skills that individuals may bring to bear on their Internet activities is  
11 exempt from the definitions of “contribution” and “expenditure.”

12 4. Individual services must be uncompensated

13 The Commission sought comments, but received none, on whether an exception  
14 for individual Internet activity should be extended to individuals who receive some form  
15 of payment for their Internet services from a candidate or a political committee. The  
16 Commission notes that the Act and Commission regulations exempt only “services  
17 provided without compensation” from the definitions of “contribution.” 2 U.S.C.  
18 431(8)(B)(i); 11 CFR 100.71 (emphasis added). Likewise, the proposed rule limited the  
19 new exceptions to uncompensated services.

20 Accordingly, these final rules exempt only those Internet services for which an  
21 individual does not receive any compensation. Campaign employees, for example, are  
22 not eligible for the exceptions in 11 CFR 100.94 and 100.155 for activities for which they  
23 are compensated. However, campaign employees are still within this exemption when

1 they engage in uncompensated Internet activities. Moreover, bloggers would not lose  
2 eligibility for the exceptions by selling advertising space to defray the operating costs of  
3 the blog, but would not be eligible for the exceptions for campaign work for which the  
4 blogger is compensated by a campaign committee or any other political committee. For  
5 example, if a political committee pays a blogger to write a message and post it within his  
6 or her blog entry, the resulting blog entry would not be exempted as “uncompensated  
7 Internet activity.” While not exempted under the final rules, such a payment to the  
8 blogger would not otherwise restrict the blogger’s activities or create an obligation on the  
9 part of the blogger to report the payment. The expenditure by the political committee is  
10 akin to a vendor payment, which the political committee must report to the FEC.  
11 Similarly, if a campaign pays a blogger for technical consulting services regarding the  
12 campaign’s website, the blogger’s activities on his or her own blog would remain eligible  
13 for the exceptions in 11 CFR 100.94 and 100.155.

14 If a campaign committee or other political committee reimburses an individual for  
15 any out-of-pocket costs that the individual may incur in performing Internet activities,  
16 such reimbursements do not constitute compensation under the final rules. Accordingly,  
17 individuals may be reimbursed by political committees for any out-of-pocket expenses  
18 they incur in performing Internet activities and remain within the exemptions in 11 CFR  
19 100.94 and 100.155. If a political committee pays the costs of setting up a website or  
20 controls the overall content, however, the website may need to carry an appropriate  
21 disclaimer under 11 CFR 110.11(a)(1).

22 5. Individual Internet activity is exempt regardless of who owns the computer  
23 equipment and where the Internet activities are performed

1           The proposed rules in the NPRM covered three situations involving the use of  
2 computer equipment and services by an individual for uncompensated Internet activities:  
3 (1) the use of computer equipment and services that the individual owns; (2) the use of  
4 computer equipment and services available at a public facility; and (3) the use of  
5 computer equipment and services on the individual’s residential premises.

6           Some commenters opposed this proposed structure as “overly lengthy and  
7 complicated in part because the proposed rule tries to predict how and where individuals  
8 will be using computers.” Some of these commenters also complained that  
9 distinguishing between sources of equipment unnecessarily complicated the proposed  
10 rules. “These individuals and volunteers should use whatever computer is normally  
11 available to and used by them,” stated one commenter. This commenter also stated that  
12 “[t]he question is not which computer is used, but whether it is used in the course of  
13 uncompensated individual and volunteer activity.”

14           The Commission agrees. Distinguishing between sources of computer equipment  
15 and locations where the Internet activities occur could lead to anomalous results. For  
16 instance, the proposed rules may have been interpreted to exempt an individual’s Internet  
17 activity if the individual used a neighbor’s computer in his or her own home or in an  
18 Internet café, but not if the individual uses a neighbor’s computer in the neighbor’s home.  
19 Additionally, the proposed rules may have been interpreted to exempt an individual’s  
20 Internet activities performed at the individual’s residence using a computer supplied by  
21 the individual’s employer, but not if the Internet activities were performed by the  
22 individual at his or her own place of work.

1           As this result was not the Commission’s intent, the final rules do not distinguish  
2 between sources of computer equipment nor locations where the Internet activities are  
3 performed. Under new 11 CFR 100.94 and 100.155, an individual does not make a  
4 contribution or expenditure when using equipment or services for uncompensated  
5 Internet activities for the purpose of influencing a Federal election, regardless of who  
6 owns such equipment or where the equipment is located. The final rules thus avoid  
7 disparate treatment of individuals or volunteers who may not be able to afford the  
8 purchase or maintenance of their own computers and websites and explicitly protect  
9 individuals who may borrow a computer from a friend, neighbor, family member, or  
10 anyone else to do political activity.

11 B. 11 CFR 100.94(b) and 100.155(b) – Definition of “Internet Activities”

12           In the rule proposed in the NPRM, the Commission defined the term “Internet  
13 activities” to include “e-mailing, including forwarding; linking, including providing a  
14 link or hyperlink to a candidate’s, authorized committee’s or party committee’s website;  
15 distributing banner messages; blogging; and hosting an Internet site.” NPRM at 16978.

16           The final rules encompass all of the same activity covered by proposed 11 CFR  
17 100.94 and 100.155, but also include the phrase “and any other form of communication  
18 distributed over the Internet.” The Commission added the phrase “and any other form of  
19 communication distributed over the Internet” to ensure that future advances in technology  
20 will be encompassed within the final rules. For example, the new rules not only cover  
21 such things as sending or forwarding electronic messages; providing a link or other direct

1 access to any person’s<sup>49</sup> Internet site; posting banner messages; and blogging, creating,  
2 maintaining, or hosting an Internet site; but also cover technology that has not yet been  
3 developed. Furthermore, the new rules cover podcasting and any other form of Internet  
4 communication that is, or might be, used for political activity. The Commission notes  
5 that the new definition of “Internet activities” contains an illustrative, rather than an  
6 exhaustive, list of the activities that are covered.

7 C. 11 CFR 100.94 (c) and 100.155(c)—Definition of “Equipment and Services”

8 The proposed rules focused on exempting an individual’s use of “computer  
9 equipment and services” for activities on the Internet and listed examples of the types of  
10 computer equipment and services covered by the proposed rules. Specifically, paragraph  
11 (c) of proposed 11 CFR 100.94 and 100.155 stated that “computer equipment and  
12 services” includes, but is not limited to, computers, software, Internet domain names, and  
13 Internet Service Provider (ISP) services.

14 The Commission has adopted the language in the NPRM defining “equipment and  
15 services” as including, but not limited to, computers, software, Internet domain names,  
16 and Internet Service Providers (ISP). In response to concerns that the proposed language  
17 was technology specific, the Commission has added the phrase “and any other  
18 technology that is used to provide access to or use of the Internet,” to ensure that future  
19 innovations in computer equipment and services will be included within the final rules.  
20 New sections 100.94 and 100.155 include, but are not limited to, computers, handheld  
21 communication devices that provide access to the Internet, software, routers, servers,

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<sup>49</sup> The term “person” means an individual, partnership, committee, association, corporation, labor organization, and any other organization, or group of persons, but does not include the Federal government or any authority of the Federal government. 11 CFR 100.10.

1 Internet access purchased from an ISP, subscription fees, blog hosting services,  
2 bandwidth, licensed graphics, domain name services, and e-mail services.<sup>50</sup>

3 The Commission notes that while individuals incur no liability for using  
4 equipment and services in the course of their uncompensated political activity, this rule  
5 change does not exempt all political activity involving the use of technology from  
6 regulation. Therefore, for example, a political committee’s purchase of computers for  
7 individuals to engage in Internet activities for the purpose of influencing a federal  
8 election, remains an “expenditure” by the political committee. Additionally, a  
9 corporation would make a prohibited in-kind “contribution” and a prohibited  
10 “expenditure” by providing software and Internet access for the specific purpose of  
11 enabling its employees to influence a federal election through political Internet activities.  
12 See 2U.S.C. 441b(a); 11 CFR 114.2. See also discussion of 11 CFR 114.9, below.

13 D. 11 CFR 100.94(d) and 100.155(d) – Exceptions Applicable to Incorporated Bloggers  
14 and Similar Corporations

15 Corporations and labor organizations are generally prohibited from making  
16 “contributions” or “expenditures” in connection with any Federal election. 2 U.S.C.  
17 441b. In the NPRM, the Commission sought comment on whether bloggers, acting as

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<sup>50</sup> In Advisory Opinion 1998-22, the Commission concluded that even if an individual acting independently incurs no additional costs in creating a website that expressly advocates the election or defeat of a clearly identified candidate, at least some portion of the underlying costs of creating and maintaining that website is an expenditure under the Act and must be reported if it exceeds \$250 in a calendar year. Later, in Advisory Opinion 1999-17, the Commission concluded that in the course of developing a website for a campaign, an individual could use “his or her personal property at home, i.e., a home computer” and incur “related costs (such as maintaining Internet service with a provider) that are part of the upkeep” of the website without making a contribution or expenditure, and without incurring any reporting obligations. Advisory Opinion 1998-22 is superseded to the extent that it treats as an “expenditure” an individual’s use of computer equipment and services for uncompensated Internet activity.

1 incorporated or unincorporated entities, should still be eligible for the exceptions to the  
2 definitions of “contribution” and “expenditure.” NPRM at 16975.

3 All commenters who addressed this topic supported exempting Internet activity  
4 by incorporated bloggers from the definitions of “contribution” and “expenditure.” Some  
5 commenters observed that bloggers often incorporate mainly for tax reasons or to limit  
6 their liability for the operation of their blogs. “Every month now, somebody threatens to  
7 sue me,” stated one blogger who indicated that the popularity of his website and the  
8 nature of the political opinions he expresses on his blog made it necessary for him to  
9 incorporate for his own legal protection.

10 The Commission agrees that providing an exception that applies to all individuals,  
11 whether incorporated or unincorporated, is the best approach. Therefore, individuals who  
12 choose to incorporate are also eligible for the new exceptions in 11 CFR 100.94 and  
13 100.155 for Internet activities by individuals. Although the activities of some  
14 incorporated bloggers may also be exempt under the media exemption (discussed below),  
15 the separate exceptions for individual activity may reach some incorporated entities that  
16 are not acting within the scope of the media exemption or that are not press entities at all.  
17 See 2 U.S.C. 431(9)(B)(i) and 11 CFR 100.72.

18 The purposes of the Act would not be furthered by prohibiting individuals’  
19 Internet activities simply because an individual incorporates for liability or tax reasons.  
20 The Supreme Court has stated that the Act’s prohibitions on corporate expenditures and  
21 contributions arise from “Congress’s concern that organizations that amass great wealth  
22 in the economic marketplace not gain unfair advantage in the political marketplace.” The  
23 Court acknowledged, however, that “[s]ome corporations have features more akin to

1 voluntary political associations than business firms, and therefore should not have to bear  
2 burdens . . . solely because of their incorporated status.” FEC v. Massachusetts Citizens  
3 for Life, 479 U.S. 238, 263 (1986). The Commission concludes that a corporation whose  
4 purpose and function is to permit an individual to engage in Internet activity is more akin  
5 to a political association than to a business firm formed to amass wealth, and thus should  
6 not be subject to the burdens of the prohibitions on corporate contributions and  
7 expenditures. Thus, the application of the new exceptions in sections 100.94 and 100.155  
8 to individuals who choose to incorporate for these specific purposes only avoids  
9 penalizing individuals for using the corporate form merely to limit their personal liability.

10       Although all commenters who discussed this issue agreed that Internet activity by  
11 individuals who choose to incorporate should be treated the same as Internet activity by  
12 unincorporated individuals, the commenters disagreed on the scope of such treatment.  
13 Some commenters noted that the Commission permits political committees to incorporate  
14 “for liability purposes only,” see 11 CFR 114.12, and recommended that the exceptions  
15 for Internet activities by individuals only apply to bloggers who incorporate for liability  
16 purposes. However, several other commenters asked the Commission to focus on the  
17 activities of the resulting corporation and their relation to the Internet activities that are  
18 the subject of the exceptions. Specifically, one commenter recommended “permit[ting]  
19 the incorporation of small online-only speakers in cases where the business of the  
20 corporation consists of the operation of a blog or other forum for online discourse.”  
21 Other commenters advocated “an exempt category of ‘blogger corporation’ [defined] as  
22 an incorporated entity whose principal purpose is to conduct blogging activities. Such

1 corporations could be treated as individuals for purposes of the campaign finance rules  
2 applicable to Internet activity.”

3         The Commission believes that the best approach to creating an exception tailored  
4 to individuals engaged in Internet activity who choose to incorporate, including bloggers,  
5 is to focus on the activities of the resulting corporation, rather than delving into the  
6 reasons for incorporation. The result of such an approach is that an individual who  
7 engages in Internet activity after incorporating is treated the same under the new  
8 exceptions as an unincorporated individual who engages in similar Internet activity.

9         Accordingly, new 11 CFR 100.94(d) and 100.155(d) provide that the exceptions  
10 in sections 11 CFR 100.94(a) and 100.155(a) apply to a corporation that meets three  
11 criteria: (1) it is wholly owned by one or more individuals; (2) it engages primarily in  
12 Internet activities; and (3) it does not derive a substantial portion of its revenues from  
13 sources other than income from its Internet activities. The Commission recognizes that  
14 incorporated bloggers and other similarly incorporated individuals often generate revenue  
15 primarily through the sale of advertising space on their own websites or through other  
16 Internet activities, such as providing subscription and membership services, and may also  
17 generate ancillary revenue from non-advertising sources, such as T-shirts, mugs, and  
18 similar merchandise. The third requirement is therefore added to preserve the exception  
19 for such incorporated bloggers and similar corporations, without creating an overly broad  
20 exception to the definitions of “contribution” and “expenditure” that would encompass  
21 the activities of any corporation engaged in online activities merely as a platform for  
22 other commercial activities. See, e.g., Advisory Opinion 2004-19 (concerning a for-  
23 profit corporation that provided commercial services to both citizens and candidates via

1 DollarVote.org website). The exceptions in 11 CFR 100.94(d) and 100.155(d) are not  
2 limited to blogging activities or any other particular Internet activity. Rather, the  
3 language in new paragraphs 100.94(d) and 100.155(d) ensures that the Internet activities  
4 of individuals who choose to incorporate are exempt from regulation as “contributions”  
5 or “expenditures,” regardless of whether the individual chooses to “blog” or to engage in  
6 any other form of Internet activity.

7 E. 11 CFR 100.94(e) and 100.155(e) – Exemption for Communications Placed for a  
8 Nominal Fee on Another Person’s Website

9 In the NPRM, the Commission noted that, consistent with the proposed revision  
10 to the definition of “public communication” to encompass communications placed for a  
11 fee on another person’s website, payments for a “public communication” on the Internet  
12 could also be a contribution or expenditure. Therefore, the Commission proposed  
13 excluding payments for placing communications on another person’s website from the  
14 new exceptions for individual Internet activity, unless the communications were placed  
15 for a nominal fee, in which case they would be excepted from the definition of  
16 contribution and expenditure. See NPRM at 16976.

17 The Commission has decided to adopt this approach. Accordingly, new  
18 paragraphs 11 CFR 100.94(e) and 100.155(e) state that the new rules exempt nominal  
19 payments for a “public communication,” as defined in 11 CFR 100.26, from the  
20 definitions of “contribution” and “expenditure.” The Commission notes, however, that a  
21 payment for a “public communication” would not necessarily result in a contribution or  
22 expenditure just because it is not exempted by one of the new exceptions; only those  
23 payments made for the purpose of influencing a Federal election or “in connection with”

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1 a Federal election would result in a contribution or expenditure. See 2 U.S.C. 431(8) and  
2 (9), 441b; 11 CFR 100.52(a), 100.111(a) and 114.2(a).

3         The allowance for the payment of a nominal fee in connection with  
4 uncompensated campaign activity on the Internet is consistent with the rules as proposed  
5 in the NPRM and the existing volunteer exception that allows for payment of a nominal  
6 fee in connection with an individual’s use of real property. See 11 CFR 100.75  
7 (permitting payment of a nominal fee for the use of a community room on an individual’s  
8 residential premises). It recognizes, as one commenter noted, that “[t]he Internet has  
9 effectively put the power of advertising communication into the hands of every citizen . .  
10 . [a]ds on blogs, for example, cost as little as \$10 per week, and ads on search engines  
11 such as Google can cost just 10 cents per click.” While the commenter’s remarks  
12 describe the low cost of some individual Internet advertisements, the Commission notes  
13 the aggregate cost of a communication, rather than the cost on a per click or per view  
14 basis, determines whether a fee is nominal. Additionally, the exemption recognizes that  
15 because many individuals who use the Internet cannot, or do not, maintain their own  
16 websites, or simply wish to post to a blog in a place where it is more likely to be seen by  
17 others, an exemption for any nominal fee to post on another person’s website is  
18 appropriate. Therefore, individuals or groups of individuals, acting independently or as  
19 volunteers, who post blogs or other content on host sites, would be entitled to the  
20 exception just as if the content were posted on their own website.

21

22

1 **IX. 11 CFR 100.73 and 100.132 – Exception for News Story, Commentary, or**  
2 **Editorial by the Media**

3 In the Act, Congress exempted from the definition of “expenditure” costs  
4 associated with “any news story, commentary, or editorial distributed through the  
5 facilities of any broadcasting station, newspaper, magazine, or other periodical  
6 publication, unless such facilities are owned or controlled by any political party, political  
7 committee, or candidate.” 2 U.S.C. 431(9)(B)(i). This exemption, commonly known as  
8 the “media exemption,” recognizes “the unfettered right of the newspapers, television  
9 networks, and other media to cover and comment on political campaigns.” H.R. Rep. No.  
10 93-1239, 93d Congress, 2d Session at 4 (1974) (emphasis added). The media exemption  
11 is implemented in sections 100.73 and 100.132 of the Commission’s rules. See 11 CFR  
12 100.73 (media exemption for contributions) and 100.132 (media exemption for  
13 expenditures).

14 In determining whether the media exemption applies, the Commission has  
15 traditionally applied a two-step analysis. First, the Commission asks whether the entity  
16 engaging in the activity is a press entity as described by the Act and Commission  
17 regulations. Second, in determining the scope of the exemption, the Commission  
18 considers: (1) whether the press entity is owned or controlled by a political party,  
19 political committee, or candidate; and (2) whether the press entity is acting as a press  
20 entity in conducting the activity at issue (i.e., whether the entity is acting in its “legitimate  
21 press function”).<sup>51</sup>

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<sup>51</sup> See Reader's Digest Association v. FEC, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); FEC v. Phillips Publishing, 517 F. Supp. 1308, 1312-1313 (D.D.C. 1981); Advisory Opinions 2005-16, 2004-07, 2000-13, 1998-17, 1996-48, 1996-41, 1996-16 and 1982-44.

1           In the NPRM, the Commission proposed changing its rules to clarify that the  
2           protections in the Act for news stories, commentary, and editorials appearing in  
3           traditional media also apply to news stories, commentary, and editorials appearing on the  
4           Internet. Specifically, the Commission proposed revising 11 CFR 100.73 and 100.132 to  
5           indicate that news stories, commentaries and editorials that otherwise would be entitled to  
6           the media exemption are likewise exempt when they are distributed using the Internet.

7           The Commission invited comment generally on the proposed changes to the  
8           media exemption. The Commission also asked a number of specific questions, including  
9           whether the proposed changes were consistent with or required by the Act; what the  
10          appropriate breadth of the exemptions should be; and whether the exceptions should be  
11          limited to entities that also have traditional, non-Internet media operations.

12          Thirty-seven of the comments filed in response to the NPRM addressed the  
13          proposed changes to the media exemption. All but one of these commenters supported  
14          extending the exemption to media activities on the Internet,<sup>52</sup> although they differed with  
15          respect to the scope of the exemption. Some commenters, for example, suggested that  
16          the Commission extend the media exemption to any independent entity that publishes  
17          material, regardless of the medium used, and regardless of whether the entity is a member  
18          of the traditional media. Others, however, opined that not everything disseminated on the  
19          Internet constitutes media activity within the meaning of the media exemption, and urged  
20          the Commission to require entities operating on the Internet to satisfy the same criteria as  
21          entities operating in traditional media in order to qualify for the exemption. All of the  
22          commenters who addressed the question agreed that applying the media exemption to the

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<sup>52</sup> The lone dissenting commenter supported exempting all Internet publications from regulation, but recommended that the Commission craft a broad exception independent of the media exemption.

1 Internet would be consistent with the Act, and none of the commenters supported limiting  
2 the media exemption to entities that also have traditional, non-Internet media operations.

3 The commenters' views on regulating bloggers were more diverse. While all  
4 commenters who addressed this topic agreed that the media exemption should extend to  
5 at least some bloggers, the commenters differed with respect to whether a blanket  
6 exemption should be created to cover all bloggers. At one end of the spectrum were  
7 those commenters who believed that "all bloggers, whether big, small, incorporated, or  
8 moonlighting, deserve the media exemption." They opined that online news provided by  
9 blogs is as "vibrant and vital" as any offline publishing; that blogs satisfy public  
10 information needs not met by traditional media; that it would be impractical for the  
11 Commission to "police" bloggers; and that it would be "harmful" for the Commission to  
12 draw lines between individual bloggers.

13 Several commenters explicitly equated bloggers to the proverbial speaker on a  
14 soapbox in the town square, and argued that any blogger who publishes "campaign-  
15 related" opinions should be shielded from regulation under the media exemption. One  
16 commenter suggested that the Commission exempt all bloggers from financial reporting  
17 and coordination requirements, while still requiring them to disclose on their websites  
18 any payments that they receive from candidates or political committees for taking a  
19 particular position in connection with a Federal election.

20 Several commenters recommended against exempting bloggers as a class from  
21 regulation. One commenter observed that "crucial questions" must be answered before  
22 any blogger or online news source qualifies for the media exemption, such as whether the  
23 entity's resources are "devoted to collecting and disseminating information to the

1 public”; whether the entity “inform[s] and educate[s] the public, offer[s] criticism, and  
2 provide[s] [a] forum[] for discussion and debate”; and whether the entity “serve[s] as a  
3 powerful antidote to governmental power abuses and hold[s] officials accountable to the  
4 people.” Another commenter urged the Commission to consider a number of “relevant  
5 factors” in determining whether a blogger qualifies for the media exemption, such as  
6 whether the blogger receives payments from a campaign; whether the blogger solicits  
7 money for candidates; and whether the blogger engages in newsgathering or  
8 editorializing.

9       The Commission has decided to revise 11 CFR 100.73 and 11 CFR 100.132 to  
10 clarify that the media exemption applies to media entities that cover or carry news stories,  
11 commentary and editorials on the Internet, just as it applies to media entities that cover or  
12 carry news stories, commentary and editorials in traditional media, such as printed  
13 periodicals or television news programs. The Commission is also clarifying that the  
14 media exemption protects news stories, commentaries, and editorials no matter in what  
15 medium they are published. Therefore, the Commission has added “website” to the list  
16 of media in the exemption and is also adding “any Internet or electronic publication” to  
17 address publication of news stories, commentaries, or editorials in electronic form on the  
18 Internet.<sup>53</sup> In so doing, the Commission recognizes that the media exemption is available

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<sup>53</sup> The terms “Internet site” and “Internet or electronic publication” are meant to encompass a wide range of existing and developing technology, such as websites, podcasts, etc. See e.g., Testimony of Markos Moulitsas Zuniga, Federal Election Commission Public Hearing on Internet Communications at 27-28 (June 28, 2005) (“It is really truly impossible for any one person to grasp the scope of Internet communication technologies . . . [O]ff the top of my head, I could think of . . . blogging, e-mail, instant messaging, message boards, Yahoo groups, Internet Relay Chat, chat groups, podcasting, Internet radio, Flash animations, Web video, Webcams, peer-to-peer, and social networking software. Then, there is Grokster, . . . And the new Apple operating system has these little applications called widgets . . . and Microsoft promises to do the same. All of these technologies have political applications, obviously, yet they are vastly different.”)

1 to media entities that cover or carry news stories, commentaries, or editorials solely on  
2 the Internet, as well as to media entities that cover or carry news stories, commentaries,  
3 and editorials solely in traditional media or in both traditional media and on the Internet.

4 The application of the media exemption to Internet communications is consistent  
5 with past instances in which the Commission has extended the media exemption to forms  
6 of media that did not exist or were not widespread when Congress enacted the exemption  
7 in 1974. For example, in 1996 the Commission changed its rules to make clear that the  
8 media exemption also applies to news stories, commentary, and editorials appearing in  
9 cable programming.<sup>54</sup> The Commission noted that, “in exempting news stories from the  
10 definition of ‘expenditure,’ Congress intended to assure ‘the unfettered right of the  
11 newspapers, TV networks and other media to cover and comment on political  
12 campaigns.’”<sup>55</sup> The Commission found that, “although the cable television industry was  
13 much less developed when Congress expressed this intent, it is reasonable to conclude  
14 that cable operators, programmers and producers, when operating in their capacity as  
15 news producers and distributors, would be precisely the type of ‘other media’  
16 appropriately included within this exemption.”<sup>56</sup>

17 Similarly, although Congress could not have envisioned the Internet when it  
18 created the media exemption more than thirty years ago, much less the revolutionary  
19 changes in the area of political communication that the Internet has made possible, the  
20 Commission finds it reasonable to conclude that entities providing news on the Internet  
21 are precisely the type of “other media” appropriately included within the media  
22 exemption. As the Supreme Court noted, “It is not the intent of Congress in [FECA]... to

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<sup>54</sup> Final Rules on Candidate Debates and News Stories, 61 FR 18049 (Apr. 24, 1996).

<sup>55</sup> Id. at 18050 (quoting H.R. Rep. No. 93-1239, 93<sup>rd</sup> Cong., 2d Sess. at 4 (1974)).

1 limit or burden in any way the First Amendment freedoms of the press and association.  
2 Thus, the exclusion assures the unfettered right of newspapers, TV networks, and other  
3 media to cover and comment on political campaigns.” Massachusetts Citizens for Life,  
4 479 U.S. at 250 (citing H.R. Rep. No. 93-129 at p.4 (1974)).

5 The Commission finds as a matter of law that the media exemption applies to the  
6 same extent to entities with only an on-line presence as to those with an off-line  
7 component as well. The Washington Post, New York Times, CNN and other newspapers  
8 and broadcast news sources maintain an on-line presence in addition to their traditional  
9 means of distribution and dissemination. Salon.com, Slate.com, and Drudgereport.com  
10 operate exclusively on-line. The Commission concludes that the media exemption  
11 applies with full force to all these types of entities.

12 The Commission has consistently viewed on-line, Internet-based dissemination of  
13 news stories, commentaries, and editorials to be indistinguishable from off-line television  
14 and radio broadcasts, newspapers, magazines and periodical publications for the purposes  
15 of applying the media exemption under the Act. For example, in Advisory Opinion  
16 2004-07, the Commission determined that the media exemption applied to MTV’s  
17 posting on its website of election-related educational materials and the results of a survey  
18 of people’s preferences for President of the United States. As the Commission noted,  
19 “websites are a common feature of many media organizations. The Commission  
20 considers posting news stories, commentaries, and editorials on a press entity’s website to  
21 be within the entity’s legitimate press functions.” Advisory Opinion 2004-07. The  
22 Commission also concluded that the media exemption would apply to MTV’s  
23 contemporaneous announcement and publication of survey results to the public via e-mail

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<sup>56</sup> Id.

1 and text messages. Id. See also Advisory Opinion 2003-32 (promotion by Showtime and  
2 Viacom on their websites of a television series about a fictional presidential election that  
3 depicted some real Federal candidates and officeholders qualified for the media  
4 exemption).

5         The Commission has considered whether an Internet video programming operator  
6 that webcast content was entitled to the media exemption when it provided coverage of  
7 the Democratic and Republican National Conventions over the Internet. In Advisory  
8 Opinion 2003-13, iNEXTV did not create programming under its own name, but rather  
9 operated its own network of specialized news and information sites that offered direct  
10 access to governmental and business news events, interviews, and commentary with  
11 political figures, and a forum where viewers could state their opinions on specific issues  
12 via computer. The Commission concluded that iNEXTV's activities on the Internet were  
13 viewable to the general public and were akin to a periodical or news program. Therefore,  
14 iNEXTV's proposed gavel-to-gavel coverage of the Democratic and Republican National  
15 Conventions fit into the categories of news story and commentary that are exempted from  
16 the definition of "contribution" and "expenditure" under the Act.

17         The Commission has also made clear that the press exemption applies to a wide  
18 variety of on-line and off-line activities. In Advisory Opinion 2005-16, the Commission  
19 determined that the media exemption applied to an entity whose Internet sites were  
20 publicly available and carried news stories, commentaries, and editorials that supported  
21 or opposed federal candidates—even where the entity was founded and controlled by a  
22 former federal officeholder and a former state party executive director. The Commission  
23 has specifically determined that the press exemption applies regardless of whether the

1 news story, commentary, or editorial contains express advocacy. Media entities routinely  
2 endorse candidates, and the media exemption protects their right to do so. See Advisory  
3 Opinion 2005-16 at 6 (noting that “an entity otherwise eligible for the press exception  
4 would not lose its eligibility...even if the news story, commentary, or editorial expressly  
5 advocates the election or defeat of a clearly identified candidate for federal office.”).

6 The Commission has also concluded that press entities do not forfeit the press  
7 exemption if they solicit contributions for candidates. See Advisory Opinion 1980-109  
8 (endorsement of a federal candidate and solicitations to the federal candidate’s campaign  
9 by a publication were covered by the news story exemption); Advisory Opinion 1982-44  
10 (concluding that solicitations for a national party committee on cable programming were  
11 protected by the press exemption).<sup>57</sup>

12 Moreover, Commissioners have repeatedly concluded that the media exemption  
13 applies without regard to whether programming is biased or balanced. See MUR 3624  
14 (Walter H. Shapiro) (concluding that pro-Bush/Quayle broadcast by Rush Limbaugh fell  
15 within the media exemption even though the broadcast was arguably biased); Statement  
16 of Reasons by Commissioners Wold, McDonald, Mason, Sandstrom, and Thomas in  
17 MURs 4929, 5006, 5090 and 5117 (ABC, CBS, NBC, New York Times, Los Angeles  
18 Times and Washington Post) (“Unbalanced news reporting and commentary are included  
19 in the activities protected by the media exemption.”); Statement of Reasons by

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<sup>57</sup> There have been recent instances in which media entities have solicited contributions for federal candidates. See e.g., Kerry for Prez: Why Him, Why Now and How to Put Him in the White House, Philadelphia Daily News, June 16, 2004 (Containing a lead editorial that stated “[Y]ou can learn more about Kerry, make a donation or volunteer to help through his web site...The commonwealth-indeed the nation-cannot afford another four years of George Bush.”). See also Charles Krauthammer, The Delusional Dean, Washington Post, December 5, 2003 at A31 (op-ed by a syndicated columnist containing a solicitation for the Republican National Committee, including instructions on where readers should send contributions).

1 Commissioners Wold and Mason in MUR 4946 (CBS News, Fox Network News, CNBC  
2 News, MSNBC News, CNN and ABC News) (“politically biased reporting and  
3 commentary remain within the ‘legitimate press function.’”). See also Statement of  
4 Reasons by Commissioner Weintraub in MURs 5540, 5545, 5562, and 5570 (CBS,  
5 Kerry/Edwards 2004, Inc. and Sinclair Broadcasting) at 2 (“It is not the role of the  
6 Federal Election Commission to determine whether a news story issued by a press entity  
7 is legitimate, responsible, or verified...Whether particular broadcasts were fair, balanced,  
8 or accurate is irrelevant given the applicability of the press exemption.”).

9         Commissioners have also concluded that the presence or absence of alleged  
10 coordination between a press entity and a candidate or political party is irrelevant to  
11 determining whether the Act’s press exemption applies. See, e.g., Statement of Reasons  
12 of Commissioners Toner, Mason and Smith in MURs 5540 and 5545 (CBS,  
13 Kerry/Edwards 2004)(“Allegations of coordination are of no import when applying the  
14 press exemption. What a press entity says in broadcasts, news stories and editorials is  
15 absolutely protected under the press exemption, regardless of whether any activities  
16 occurred that might otherwise constitute coordination under Commission regulations.”);  
17 Statement of Reasons of Commissioner Weintraub in MURs 5540, 5545, 5562, and 5570  
18 (CBS, Kerry/Edwards 2004, Sinclair Broadcasting) (“I believe it is important to  
19 emphasize that the press exemption shields press entities from investigations into alleged  
20 coordination.”)

21         More recently, the Commission has determined that the media exemption applied  
22 to a blogger that covered and carried news stories, commentaries, or editorials. In  
23 Advisory Opinion 2005-16, the Commission analyzed the Internet activity of Fired Up!

1 LLC (“Fired Up”), an entity that maintained a network of Internet websites but had no  
2 offline media presence. The Commission found that a primary function of Fired Up’s  
3 websites was to provide news and information to readers through commentary on, quotes  
4 from, summaries of, and hyperlinks to news articles appearing on other entities’ websites  
5 and Fired Up’s original reporting. The Commission viewed the posting of reader  
6 comments to the website as similar to letters to the editor and noted that FiredUp retained  
7 editorial control over the content displayed on its websites.<sup>58</sup> The Commission concluded  
8 that the activities of Fired Up’s websites were protected by the media exemption.

9 The Commission has decided not to change its rules regarding the media  
10 exemption so as to exempt all blogging activity from the definitions of “contribution” and  
11 “expenditure.” The Commission believes that such an exemption for one technology-  
12 specific category would be both too broad and too narrow: it would apply equally to  
13 blogging activity “that [is] not involved in the regular business of imparting news to the  
14 public”<sup>59</sup> and communications that are not news stories, commentary or editorials within  
15 the meaning of the media exemption;<sup>60</sup> at the same time, it would overlook other forms of  
16 Internet communication, such as publishing websites in other formats or podcasting, that  
17 are equally deserving of consideration under the media exemption.<sup>61</sup> Moreover, given  
18 that methods of communicating over the Internet “are constantly evolving and difficult to

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<sup>58</sup> In Advisory opinion 1982-44 the Commission made clear that “commentary” within the meaning of the press exemption is not limited to commentaries made by the broadcaster. The Commission emphasized that “‘commentary’ was intended to allow third persons access to the media to discuss issues. The statute and regulations do not define the issues permitted to be discussed or the format in which they are to be presented under the ‘commentary’ exemption.”

<sup>59</sup> McConnell, 540 U.S. at 208.

<sup>60</sup> See id. (“Section 304(f)(3)(B)(I)’s effect ...excepts news items and commentary only.”).

<sup>61</sup> See note 3 *infra* clarifying that the terms “Internet site” and “any Internet or electronic publication” are meant to address a wide range of technology that may be used by entities entitled to the press exemption.

1 categorize precisely,” the wholesale exemption of any particular method of Internet  
2 communication would be ill advised. Reno, 521 U.S. at 851.

3 Further, the Commission’s concludes that bloggers and others who communicate  
4 on the Internet are entitled to the press exemption in the same way as traditional media  
5 entities. This is in keeping with the roles that bloggers play in the way that the public  
6 receives their news and information. Bloggers were issued press credentials for the  
7 National Nominating Conventions in 2004<sup>62</sup> and, more recently, a blogger was issued  
8 permanent press credentials as a member of the White House press corps.<sup>63</sup> Bloggers  
9 who are covering and reporting news stories in the same way that traditional media  
10 entities have reported on news worthy events are entitled to the same media exemption  
11 protection as applies to other media entities such as CNN, NBC, and other traditional  
12 media.<sup>64</sup>

13 The Commission recognizes that the Internet allows for constant, up-to-the-  
14 minute reporting and coverage. The Commission has concluded that online providers of  
15 news stories, commentaries and editorials are within the press exemption. This  
16 conclusion reflects a broad reading of “periodical publication.” In Advisory Opinion  
17 1980-109, the Commission stated that a “periodical publication” means “a publication in  
18 bound pamphlet form appearing at regular intervals (usually either weekly, bi-weekly,  
19 monthly or quarterly) and containing articles of news, information, or entertainment.”  
20 However, with the advent of the Internet, frequent updating of the content of a website  
21 has become commonplace and is not tied to a publishing schedule but to the fast pace of

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<sup>62</sup> See <<http://www.cnn.com/2004/TECH/internet/07/23/conventionbloggers/>> (last visited 3/24/06).

<sup>63</sup> See <<http://www.foxnews.com/story/0,2933,149689,00.html>> (last visited 3/24/06).

<sup>64</sup> The Commission notes that media entities such as the Washington Post, MSNBC, Fox News, and CNN have bloggers reporting news and commentary on their websites.

1 breaking news and the availability of information. The Commission finds that the term  
2 “periodical” within the meaning of the Act’s media exemption ought not be construed  
3 rigidly to deny the media exemption to entities who update their content on a frequent,  
4 but perhaps not fixed, schedule. Nor can “periodical publication” be restricted to works  
5 appearing in a bound, pamphlet form. To the extent that the conclusions in Advisory  
6 Opinion 1980-109 are not applicable to online media, that opinion is hereby  
7 distinguished. The Commission notes that media entities such as washingtonpost.com  
8 and drudgereport.com, as well as many blogs, are updated throughout the day and  
9 function consistent with a dynamic definition of periodical publication.

10

11 **X. 11 CFR 114.9 – Use of Corporate or Labor Organization Facilities**

12 [TO BE SUPPLIED LATER]

13

14 **Certification of No Effect Pursuant to 5 U.S.C. § 605(b)**

15 **[Regulatory Flexibility Act]**

16 The Commission certifies that the attached final rules will not have a significant  
17 economic impact on a substantial number of small entities. The basis for this  
18 certification is that the individuals and not-for-profit entities affected by these proposed  
19 rules are not “small entities” under 5 U.S.C. 601. The definition of “small entity” does  
20 not include individuals, but classifies a not-for-profit enterprise as a “small organization”  
21 if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4).

22 State, district, and local party committees affected by these proposed rules are  
23 not-for-profit committees that do not meet the definition of “small organization.” State

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1 political party committees are not independently owned and operated because they are  
2 not financed and controlled by a small identifiable group of individuals, and they are  
3 affiliated with the larger national political party organizations. In addition, the State  
4 political party committees representing the Democratic and Republican parties have a  
5 major controlling influence within the political arena of their State and are thus dominant  
6 in their field. District and local party committees are generally considered affiliated with  
7 the State committees and need not be considered separately.

8         Separate segregated funds affected by these proposed rules are not-for-profit  
9 political committees that do not meet the definition of “small organization” because they  
10 are financed by a combination of individual contributions and financial support for  
11 certain expenses from corporations, labor organizations, membership organizations, or  
12 trade associations, and therefore are not independently owned and operated.

13         Most other political committees affected by these rules are not-for-profit  
14 committees that do not meet the definition of “small organization.” Most political  
15 committees are not independently owned and operated because they are not financed by a  
16 small identifiable group of individuals. Most political committees rely on contributions  
17 from a large number of individuals to fund the committees’ operations and activities.

18         To the extent that any State party committees representing minor political parties  
19 or any other political committees might be considered “small organizations,” the number  
20 affected by this proposed rule is not substantial. Additionally, the proposed rule  
21 preserves the Commission’s general exclusion of Internet communications from the  
22 scope of regulation, and only State, district, and local political parties and candidates  
23 could be subject to different funding requirements for certain communications.

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1 Accordingly, to the extent that any other entities may fall within the definition of “small  
2 entities,” any economic impact of complying with these rules will not be significant.

3

4 **List of Subjects**

5 11 CFR Part 100

6 Elections.

7 11 CFR Part 110

8 Campaign funds.

9 Political committees and parties.

10 11 CFR Part 114

11 Business and industry, elections, labor.

Draft

1 For the reasons set out in the preamble, the Federal Election Commission amends  
2 Subchapter A of Chapter 1 of Title 11 of the Code of Federal Regulations as follows:

3 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

4 1. The authority citation for part 100 continues to read as follows:

5 Authority: 2 U.S.C. 431, 434, and 438(a)(8).

6 2. Section 100.25 continues to reads as follows:

7 **§ 100.25 Generic campaign activity (2 U.S.C. 431(21)).**

8 Generic campaign activity means a public communication that promotes or opposes a  
9 political party and does not promote or oppose a clearly identified Federal candidate or a  
10 non-Federal candidate.

11 3. Section 100.26 is revised to read as follows:

12 **§ 100.26 Public communication (2 U.S.C. 431(22)).**

13 Public communication means a communication by means of any broadcast, cable, or  
14 satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing  
15 or telephone bank to the general public, or any other form of general public political  
16 advertising. The term general public political advertising shall not include  
17 communications over the Internet, except for communications placed for a fee on another  
18 person's website.

19 4. The introductory text of section 100.73 is revised to read as follows:

20 **§ 100.73 News story, commentary, or editorial by the media.**

21 Any cost incurred in covering or carrying a news story, commentary, or editorial  
22 by any broadcasting station (including a cable television operator, programmer or  
23 producer), website, newspaper, magazine, or other periodical publication, including any

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1 Internet or electronic publication, is not a contribution unless the facility is owned or  
2 controlled by any political party, political committee, or candidate, in which case the  
3 costs for a news story:

4 \* \* \* \* \*

5 5. Section 100.94 is added to read as follows:

6 **§ 100.94 Uncompensated Internet activity by individuals that is not a contribution.**

7 (a) When an individual or a group of individuals, acting independently or in coordination  
8 with any candidate, authorized committee, or political party committee, engages in  
9 Internet activities for the purpose of influencing a Federal election, neither of the  
10 following is a contribution by that individual or group of individuals:

11 (1) the individual's uncompensated personal services related to such Internet  
12 activities;

13 (2) the individual's use of equipment or services for uncompensated Internet  
14 activities, regardless of who owns the equipment and services.

15 (b) Internet activities. For the purposes of this section, the term Internet activities  
16 includes, but is not limited to: sending or forwarding electronic messages; providing a  
17 hyperlink or other direct access to another person's website; blogging; creating  
18 maintaining or hosting a website; paying a nominal fee for the use of another person's  
19 website; and other forms of communication distributed over the Internet.

20 (c) Equipment and services. "Equipment and services" within the meaning of this  
21 section shall include, but are not limited to: computers, software, Internet domain names,  
22 Internet Service Provider (ISP), and any other technology that is used to provide access to  
23 or use of the Internet.

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1 (d) Paragraph (a) of this section also applies to any corporation that is wholly owned by  
2 one or more individuals, that engages primarily in Internet activities, and that does not  
3 derive a substantial portion of its revenues from sources other than income from its  
4 Internet activities.

5 (e) This section does not exempt from the definition of contribution:

6 (1) any payment for a public communication (as defined in 11 CFR 100.26)  
7 other than a nominal fee; or

8 (2) any payment for the purchase or rental of an e-mail address list made at  
9 the direction of a political committee; or

10 (3) any payment for an e-mail address list that is transferred to a political  
11 committee.

12 6. The introductory text of section 100.132 is revised to read as follows:

13 **§ 100.132 News story, commentary, or editorial by the media.**

14 Any cost incurred in covering or carrying a news story, commentary, or editorial  
15 by any broadcasting station (including a cable television operator, programmer or  
16 producer), website, newspaper, magazine, or other periodical publication, including any  
17 Internet or electronic publication, is not an expenditure unless the facility is owned or  
18 controlled by any political party, political committee, or candidate, in which case the cost  
19 for a news story:

20 \* \* \* \* \*

21 7. Section 100.155 is added to read as follows:

22 **§ 100.155 Uncompensated Internet activity by individuals that is not an expenditure.**

1 (a) When an individual or a group of individuals, acting independently or in coordination  
2 with any candidate, authorized committee, or political party committee, engages in  
3 Internet activities for the purpose of influencing a Federal election, neither of the  
4 following is an expenditure by that individual or group of individuals:

5 (1) the individual's uncompensated personal services related to such Internet  
6 activities;

7 (2) the individual's use of equipment or services for uncompensated Internet  
8 activities, regardless of who owns the equipment and services.

9 (b) Internet activities. For the purposes of this section, the term Internet activities  
10 includes, but is not limited to: sending or forwarding electronic messages; providing a  
11 hyperlink or other direct access to another person's website; blogging; creating  
12 maintaining or hosting a website; paying a nominal fee for the use of another person's  
13 website; and other forms of communication distributed over the Internet.

14 (c) Equipment and services. "Equipment and services" within the meaning of this  
15 section shall include, but are not limited to: computers, software, Internet domain names,  
16 Internet Service Provider (ISP), and any other technology that is used to provide access to  
17 or use of the Internet.

18 (d) Paragraph (a) of this section also applies to any corporation that is wholly owned by  
19 one or more individuals, that engages primarily in Internet activities, and that does not  
20 derive a substantial portion of its revenues from sources other than income from its  
21 Internet activities.

22 (e) This section does not exempt from the definition of expenditure:

- 1            (1) any payment for a public communication (as defined in 11 CFR 100.26)  
2                            other than a nominal fee; or  
3            (2) any payment for the purchase or rental of an e-mail address list made at  
4                            the direction of a political committee; or  
5            (3) any payment for an e-mail address list that is transferred to a political  
6                            committee.

7            8. Paragraph (a) of section 110.11 is revised to read as follows:

8            **§ 110.11 Communications; advertising; disclaimers (2 U.S.C. 441d).**

9            (a) Scope. ~~This section applies only to public communications, defined for this section~~  
10 ~~to include the communications at 11 CFR 100.26 plus unsolicited electronic mail of more~~  
11 ~~than 500 substantially similar communications and; Internet websites of political~~  
12 ~~committees available to the general public; and electioneering communications as defined~~  
13 ~~in 11 CFR 100.29.~~ The following types of such communications must include  
14 disclaimers, as specified in this section:

- 15            (1) All public communications, as defined in 11 CFR 100.26, made by for  
16 ~~which a political committee makes a disbursement;~~ electronic mail of more  
17 than 500 substantially similar communications when sent by a political  
18 committee; and all Internet websites of political committees available to  
19 the general public.  
20            (2) All public communications, as defined in 11 CFR 100.26, by any person  
21 that expressly advocate the election or defeat of a clearly identified  
22 candidate.

1 (3) All public communications, as defined in 11 CFR 100.26, by any person  
2 that solicit any contribution.

3 (4) \* \* \*

4 \* \* \* \* \*

5 9. Amend section 114.9 by:

- 6 i. Redesignating paragraph (a)(2) as paragraph (a)(3);
- 7 ii. Redesignating paragraph (b)(2) as paragraph (b)(3); and
- 8 iii. Revising paragraphs (a)(1), (a)(2), (b)(1), and (b)(2), and adding new  
9 paragraph (e), to read as follows:

10 **§ 114.9 Use of corporate or labor organization facilities.**

11 (a) Use of corporate facilities for individual volunteer activity by stockholders and  
12 employees.

13 (1) Stockholders and employees of the corporation may, subject to the rules  
14 and practices of the corporation and 11 CFR 100.54, make occasional,  
15 isolated, or incidental use of the facilities of a corporation for individual  
16 volunteer activity in connection with a Federal election and will be  
17 required to reimburse the corporation only to the extent that the overhead  
18 or operating costs of the corporation are increased. A corporation may not  
19 condition the availability of its facilities on their being used for political  
20 activity, or on support for or opposition to any particular candidate or  
21 political party. As used in this paragraph, occasional, isolated, or  
22 incidental use generally means--

23 (i) \* \* \*

1 (ii) When used by stockholders other than employees during the  
2 working period, such use does not interfere with the corporation in  
3 carrying out its normal activities; ~~but,~~

4 ~~(iii) Any such activity which does not exceed one hour per week or~~  
5 ~~four hours per month, regardless of whether the activity is~~  
6 ~~undertaken during or after normal working hours, shall be~~  
7 ~~considered as occasional, isolated, or incidental use of the~~  
8 ~~corporate facilities.~~

9 (2) Safe harbor. For the purposes of paragraph (a)(1) of this section, the  
10 following shall be considered occasional, isolated, or incidental use of  
11 corporate facilities:

12 (i) Any such activity that does not exceed one hour per week or four  
13 hours per month, regardless of whether the activity is undertaken  
14 during or after normal working hours; or

15 (ii) Any such activity that constitutes voluntary individual Internet  
16 activity (as defined in 11 CFR 100.94), in excess of one hour per  
17 week or four hours per month, regardless of whether the activity is  
18 undertaken during or after normal working hours, provided that:

19 (A) As specified in 11 CFR 100.54, the activity does not  
20 prevent the employee from completing the normal amount  
21 of work for which the employee is paid or is expected to  
22 perform;



- 1 (i) \* \* \*
- 2 (ii) When used by members other than employees during the working
- 3 period, such use does not interfere with the labor organization in
- 4 carrying out its normal activities; ~~but~~.
- 5 (iii) Any such activity which does not exceed one hour per week or
- 6 four hours per month, regardless of whether the activity is
- 7 undertaken during or after normal working hours shall be
- 8 considered as occasional, isolated, or incidental use of the labor
- 9 organization facilities.
- 10 (2) Safe harbor. For the purposes of paragraph (a)(1) of this section, the
- 11 following shall be considered occasional, isolated, or incidental use of
- 12 labor organization facilities:
- 13 (i) Any such activity that does not exceed one hour per week or four
- 14 hours per month, regardless of whether the activity is undertaken
- 15 during or after normal working hours; or
- 16 (ii) Any such activity that constitutes voluntary individual Internet
- 17 activity (as defined in 11 CFR 100.94), in excess of one hour per
- 18 week or four hours per month, regardless of whether the activity is
- 19 undertaken during or after normal working hours, provided that:
- 20 (A) As specified in 11 CFR 100.54, the activity does not
- 21 prevent the employee from completing the normal amount
- 22 of work for which the employee is paid or is expected to
- 23 perform;

